United States Supreme Court

OCTOBER TERM 1913

NO. 12. ORIGINAL

IN RE A. ENGELHARD & SONS CO., Petitioner

EXHIBITS WITH PETITION

COURIER-JOURNAL JOB PRINT. LOUISVILLE

TORN PAGE

District Court of the United States

Western District of Kentucky.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Complainant,*

v.

CITY OF LOUISVILLE, *Defendant.*

MOTION.

Exhibit 7.

Filed June 20, 1913.

Comes the intervening petitioner, A. Engelhard & Sons Company, and moves the Court for an order directing A. G. Ronald, Esq., Special Master, appointed herein under the order of reference of date November 2, 1912, to withhold his report under said order of reference and postpone the filing thereof until after the Supreme Court of the United States has passed upon the matters now pending before it and involved in the two petitions for a writ of mandamus against the judge of this Court, one being styled In re City of Louisville, Kentucky, and the other being styled In re A. Engelhard & Sons Company; and in support of said motion the affidavit of C. B. Blakey, one of the attorneys for the intervening petitioner, is filed herewith.

C. B. BLAKEY,
HUSTON QUIN,
Attorneys for A. Engelhard & Sons Co.

Exhibit 8.

AFFIDAVIT.

Filed June 20, 1913.

The affiant, C. B. Blakey, says that he is one of the attorneys for the intervening petitioner, A. Engelhard & Sons Company. That the said A. Engelhard & Sons Company has petitioned the Court in the above styled cause for permission to represent and sue on behalf of all patrons of the complainant who paid to it sums in excess of the rate ordinance of March 6, 1909, referred to in the pleadings in this cause, which permission has been refused. That the said Engelhard & Sons Company has tendered and been permitted to file in the Supreme Court of the United States a petition, wherein it seeks a writ of mandamus against the judge of this Court, directing him to permit the said A. Engelhard & Sons Company to represent and sue for all of said patrons of the complainant. That the Supreme Court of the United States has issued a rule returnable October 13, 1913, directed to the judge of this Court, calling on him to show cause why the said A. Engelhard & Sons Company should not be permitted to represent the said patrons of the complainant in that behalf; affiant says that he is informed and believes that the rule so awarded by the Supreme Court has been served on the judge of this Court.

Affiant says that he was one of the attorneys for the City of Louisville during the trial of the above styled cause, and is familiar with the entire record. He says that under the order of reference heretofore made, wherein Mr. Henry Burnett was appointed a Special Master to

determine and report to the Court certain facts, the complainant and defendant selected two expert accountants to examine the books and records of the complainant and to ascertain, among other things, the names of the complainant's patrons, the class of service each patron had, and the amount each patron was paying for such service. That said accountants agreed that a certain list of patrons, showing the class of service and the price they were paying therefor, which had been filed by H. Blair Smith, auditor of the complainant, with his deposition, as Exhibit No. 6, was correct.

Affiant says that he is informed by A. G. Ronald, Esq., Special Master, appointed by this Court to ascertain the names of the complainant's patrons who paid to the complainant sums in excess of the ordinance rate above referred to, that he (the said Special Master) will on Monday, June 23, 1913, file his report under said order of reference. Affiant says that he has been permitted to examine the proposed report of the said A. G. Ronald, Esq., Special Master. He says that he has examined said report with a view to ascertaining whether the names of the patrons of the complainant, who, according to the exhibit filed with the deposition of H. Blair Smith, were paying sums to the complainant in excess of said rate ordinance, appeared on the proposed report of the said Special Master. He says that in making said examination he selected at random one hundred and fifty names that appeared upon the exhibit above referred to, and who were shown by said exhibit to be paying sums in excess of said rate ordinance, and that out of said one hundred and fifty names he failed to find in the proposed report of the Special Master the names of six patrons of the

complainant, who, according to said exhibit, were paying more than the ordinance rate, said names being as follows: Henry Andresson, F. G. Carey, Flexner & Campbell, Day & Co., Grant, W. E. & W. C., Campbell & Young.

He says that the proposed report contains the names of more than seven thousand of complainant's patrons, who paid to it sums in excess of the ordinance rate. He also says that the exhibit filed with the deposition of H. Blair Smith, above referred to, contains the names of more than nine thousand of the complainant's patrons, many of whom paid to the complainant sums in excess of the rate ordinance.

He says he has not compared the names, and the class of service, and the rates being charged therefor, which appear in the said exhibit with the proposed report of the Special Master, further than as above shown, and that he cannot tell how many patrons of the complainant whose names appear in said exhibit fail to appear in the said proposed report of the Master, if any.

Affiant says that since the 10th day of March, 1913, he has been an attorney of record in this cause, seeking on behalf of his client and others the sole object of recovering from the complainant the amounts which it exacted from its patrons in excess of the rates fixed in the ordinance above referred to. That the said A. G. Ronald, Esq., as such Special Master, has never notified him of any hearing under the order of reference above referred to, and affiant is informed by the said Special Master that no hearing has ever been had under said order of reference at which counsel for the interested parties were invited to be present or present any proof.

Affiant says that on June 17, 1913, he requested the said A. G. Ronald, Esq., Special Master, to delay the filing of his report until such time as the Supreme Court could pass on the petition for the writ of mandamus above referred to and the rights of the interested parties could be investigated, but that the said Special Master declined to grant affiant's request and has informed affiant that he will, on June 23, 1913, file said report. Affiant says that if said report is filed on June 23d, it will, in affiant's opinion and belief, result in many of the complainant's patrons, who have paid to it sums in excess of the rate ordinance, being deprived of the amounts to which they are justly entitled.

Affiant says, moreover, that the purpose of the intervening petition filed by A. Engelhard & Sons Company in this cause, and the purpose of the petition for a writ of mandamus filed by the said A. Engelhard & Sons Company in the Supreme Court of the United States, was that it, through its counsel, might appear in this cause and protect the rights of the patrons of the complainant who are entitled to restitution. That if the said report of the Special Master is filed at the present time, and if hereafter the Supreme Court should grant the writ of mandamus sought by the said A. Engelhard & Sons Company, it will then be too late for the said A. Engelhard & Sons Company, through its counsel, to render any service to those patrons of the complainant who are entitled to restitution and whose names do not appear upon the said report of the Special Master as so entitled to such restitution; neither can any service be rendered to those patrons of the complainant whose names appear on said re-

port, but who are entitled to more than the amount designated in said report, if any there be.

Affiant further says that no party to this litigation and no patron of the complainant entitled to restitution will be prejudiced by the delay sought herein by the intervening petitioner.

Further affiant saith not.

C. B. BLAKEY.

Subscribed and sworn to before me by C. B. Blakey, this 20th day of June, 1913. My notarial commission expires ————.

HUSTON QUIN,
Notary Public, Jefferson County, Kentucky.

Exhibit 9.

OPINION ON MOTION OF A. ENGELHARD & SONS COMPANY.

Filed June 23, 1913.

The corporation known as A. Engelhard & Sons Company on the 20th inst., moved the Court for an order directing A. G. Ronald, Esq., the Special Master appointed on November 2, 1912, to withhold his report and postpone the filing of the same until after the Supreme Court has passed upon the matters now pending before it and involved in two petitions for writs of mandamus against the judge of this Court, one filed by the City of Louisville and the other by the said A. Englehard & Sons Company. In support of said motion the said A. Engelhard & Sons Company filed the affidavit of C. B. Blakey. Not only so, but the motion was argued by Mr. Blakey and Mr. Beckley, the city attorney. It may be well to recall that on No-

vember 2, 1912, on motion of the City of Louisville, through Mr. Blakey, the then city attorney, an order of reference was made and Mr. Ronald was appointed the Special Master. This reference had for one of its principal objects the ascertainment of the names of the subscribers to the service of the plaintiff Telephone Company between March 8, 1909, and July 1, 1912, the amount paid by each subscriber for telephone service in the City of Louisville between those dates, and the difference between the amounts actually paid and those that would have been paid under the rates fixed by the ordinance of the City of Louisville which has been attacked in this litigation. The reference involved an immense labor. On the 23d day of May last the Special Master placed on view in his office a complete preliminary statement of all those things, and in a notice sent through the mail invited each and every subscriber, individually, to come to his office, examine the proposed report, and point out any error therein, and to do so before this date, namely, June 23, 1913, at which time the report would be filed in Court. All who desire to do this have done so. Among those notified at the outset were the city attorney, Mr. Beckley, and Mr. Blakey, the attorney of A. Englehard & Sons Company, and that corporation itself. The difference between the amount actually paid by the latter corporation between the dates indicated and the ordinance rates was ascertained to be $21.50. The latter concern had heretofore filed a petition asking the Court's leave, not only to intervene herein, but to be allowed to defend this action on behalf of all other persons similarly situated. On the 10th day of March, 1913, the Court entered an order giving leave to file the

intervening petition, and which order also contained the following provision:

> "But so far as the said A. Engelhard & Sons Company by its said bill of intervention prays to be permitted to act or claim herein for or on behalf of any other person than itself, its prayer is denied and overruled, but with liberty to renew the same whenever it shall be made to appear to the Court in any appropriate way that other specifically named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, said company shall be at liberty to apply for leave to do so."

Instead of making any showing, such as the one indicated in the order, that corporation has made the motion we are considering and based it upon grounds which may be summed up in the following extract from the affidavit of Mr. Blakey, namely:

> "He says that he has examined said report with a view to ascertaining whether the names of the patrons of the complainant, who, according to the exhibit filed with the deposition of H. Blair Smith, were paying sums to the complainant in excess of said rate ordinance, appeared on the proposed report of the said Special Master. He says that in making said examination he selected at random one hundred and fifty names that appeared upon the exhibit above referred to, and who were shown by said exhibit to be paying sums in excess of said rate ordinance, and that out of said one hundred and fifty names he failed to find in the proposed report of the Special Master the names of six patrons of the complainant, who, according to said exhibit, were paying more than the ordinance rate, said names being as follows:
>
> "Henry Andresson, F. G. Carey, Flexner & Campbell, Day & Co., Grant, W. E. & W. C., Campbell & Young."

Considering the order referred to, and the affidavit in connection the one with the other, we cannot quite see that the interest of A. Engelhard & Sons Company is other than a merely benevolent one, as that corporation does not in any way show that either one of the six persons named in the affidavit has in anywise requested or desired A. Engelhard & Sons Company to act for him, nor does A. Engelhard & Sons Company make any showing that either one of those six persons has any interest in the question involved in the motion. But whether this motion be mere intrusion or not, we may say that it is entirely certain that with much less labor than it required to prepare the motion and the affidavit filed in its support, that corporation could have ascertained that neither one of the persons indicated has any interest in the motion, that is to say—

1st. The names and accounts of the two doctors, W. E. and W. C. Grant, are on the report as prepared, and though notified of the exact situation, as were all other subscribers, have made no objection to what is there ascertained as to them.

2d. The two lawyers, Campbell & Young, then had their telephone in the Norton Building in the name of A. B. Young. Their account is shown upon the report. The required notice was given them of what it will show, and it does not appear that either of them has in any way requested A. Engelhard & Sons Company to look after their interest.

3d. The same may be said of the two lawyers, Flexner & Campbell. Their names were at first alphabetically mislocated on the proposed report, though the card was not, and it was easy to find their account.

4th. Day & Co., under the name of Highland Livery Stable, are not only embraced in the draft of the report, but having been notified, have showed a slight error against them, which was corrected and a card of correction sent for their information.

5th. Henry Andresson, of 5 Ormsby Place, was first incorrectly put down as Henry Anderson, 5 Ormsby Place, by there has been no trouble about that since the clerical error made in copying the name was discovered; and,

6th. There was never, during the period referred to, namely, from March 8, 1909, to July 1, 1912, any subscriber in Louisville, Ky., of the name of F. G. Carey, however much, such a name may possibly have appeared in the list of subscribers in some other town. Besides, A. Engelhard & Sons Company show no right to interfere in his behalf.

Not only is it not shown that A. Engelhard & Sons Company has any right to interfere with the affairs of either of the six persons or firms mentioned in the affidavit, but so far as such persons or firms exist at all in Louisville, it appears from the report, as prepared, that their interests have been adequately looked after without the assistance of the A. Engelhard & Sons Company. Indeed, we think it may fairly be presumed that each of those named is able to take care of his own interests.

The motion of that corporation obviously is without merit, whatever may result from the proceedings in the Supreme Court for writs of mandamus, and, for that reason and the others indicated, the motion will be denied and overruled.

But the Court may add that as the possibility of error is obvious in a case where nearly 8,000 separate accounts

are to be examined, it will not be forgotten by the Court that upon any proper showing, leave will hereafter be given the Special Master to file such supplementary reports as may appear necessary or proper, to the end that justice may fairly be done to all subscribers, regardless of whether a suggestion to that effect shall or shall not be made by A. Engelhard & Sons Company. And this will all be done as nearly as possible without any expense to any individual subscriber.

WALTER EVANS, *Judge.*

Exhibit 10.

ORDER.

Entered June 23, 1913.

The Court being sufficiently advised of the motion of A. Engelhard & Sons Company, made herein on the 20th instant for an order directing A. G. Ronald, Esq., Special Master, to withhold his report and postpone the filing of same upon the matters referred to him under the order of November 2, 1912, until after the Supreme Court had acted upon certain petitions for writs of mandamus against the judge of the Court, delivered an opinion in writing thereon, which is filed, and pursuant thereto it is ordered, adjudged and decreed that the said motion should be, and it is, denied and overruled.

Exhibit 11.

REPORT AND FINDINGS OF THE SPECIAL MASTER.

Filed June 23, 1913.

As Special Master herein, I respectfully present this, my report and findings, as directed by the orders of this

Honorable Court made and entered herein on the 2d day of November, 1912.

Under the order above referred to, a certified copy of which is attached to this report, I was directed to ascertain and report,

(a) The names and addresses of all persons, firms and corporations who were subscribers to the complainant's service in Louisville Ky., between the 8th day of March, 1909, and the 1st day of July, 1912;

(b) The rate, or amount, charged by the complainant to each of said subscribers;

(c) The rate, or amount, authorized by the ordinance of March 6, 1909, to be charged each subscriber;

(d) The total sum paid by each subscriber to the complainant for service rendered between the 8th day of March, 1909, and the 1st day of July, 1912;

(e) The total amount that the complainant would have been authorized to collect from each subscriber during said period under the ordinance of March 6, 1909;

(f) The total excess between the amount actually collected by the complainant and the rates fixed by said ordinance.

In complying with the above directions I found, after an examination of the books of the complainant, it was most practical to adopt a card system. The account of each separate subscriber was taken from the books of the complainant and set forth on a separate card. Where a subscriber had several telephones, a separate card was used for each telephone, and, in some instances, where the character of service was repeatedly changed, more than one card has been used for a single subscriber. These cards formed the working papers used by me and show

all the data from which the results herein set forth were obtained.

In work of this character, involving nearly eight thousand separate accounts, with a multitude of figures and many fractional calculations, it is extremely probable some error may have occurred, and I therefore return with this report all of said cards in order that the individual subscribers, if they so desire, may have the opportunity to examine same and ascertain the correctness of the accounts stated. In order that each subscriber might have due notice and full opportunity to correct the error in his account, if any existed, on May 23, 1913, I mailed to each subscriber whose names appeared on the books of the complainant between the dates mentioned in the order of reference, the following post card with the blanks filled so as to show the statement of his account:

"United States District Court.

"Cumberland Telephone Co. v. City of Louisville.

"Dear Sir:

"You are notified that the prepared report of the undersigned Special Master in said cause is now, and until June 23, 1913, will be open to inspection in the clerk's office of the Court, so that you may suggest to the undersigned any error in the statement therein made, that between March 8, 1909, and July 1, 1912, the amount paid by you to the said company for the use of its telephone service in this city was $———; that the sum you would have paid under the ordinance enacted by the said city would have been $———, the difference or excess being $———. If you think there is any error in the figures just given, you are invited to point it out to the undersigned before June 23, 1913, on which day the report will be filed in Court.

A. G. RONALD,
Special Master."

"May 23, 1913.

In response to the above notice, hundreds of subscribers in person or by letter have either verified the accuracy of the statement of their account, or have suggested errors therein. In the latter case each account has been carefully rechecked, and where any result was obtained different from that shown in the card originally mailed, another card was mailed to the subscriber containing the corrected statement and bearing across its face the endorsement "Rechecked and Corrected Card."

Prior to its lodgment in the clerk's office I notified counsel for the complainant, the city attorney and also the late city attorney, Mr. Blakey, now counsel for A. Engelhard & Sons Company and others, that said report would be left in the clerk's office for their inspection, explaining that the object of thus submitting a trial report was to afford opportunity to correct errors, if any, without the expense of exceptions which the actual filing of the report would entail under Equity Rule No. 67. Since the 23d day of May, 1913, a draft of this report has been in the clerk's office available to counsel for all parties who were invited to examine same and present for hearing any changes, modifications, or errors which might occur to them. Such changes as have been suggested by counsel have been heard and given thorough consideration and the modifications proposed sustained or overruled as the facts justified.

I have used every means known to me to advise all parties in interest of the pendency of this reference and to afford them an opportunity to be heard, and notwithstanding the matter has been widely advertised by the press it is possible that in handling such a multitude of accounts some person may have been overlooked and has

yet failed to present a claim. If this should be made to appear at any time before the final disposition of the case, I shall ask leave of the Court to file a supplemental report embracing such claim or claims.

In making up this report I have disregarded all accounts where the amount paid by the subscriber was less than the rate prescribed by the ordinance, as in such a case there could, of course, be no excess.

In going over the books of the complainant I find it has rendered to some of its subscribers service of a varied character, such as extension bells, additional names in its directory, joint usage of the same telephone by several subscribers, private exchanges, etc., none of which the ordinance attempts to regulate and the charges for which I have excluded from my calculations in arriving at the results herein stated.

The total number of accounts audited is seven thousand, seven hundred and thirty-five (7,735), and the total excess between the rates collected by the complainant and the rates authorized by the ordinance between the dates mentioned in the order of reference I find to be one hundred and thirty-six thousand, six hundred and eighty-six dollars and forty-two cents ($136,686.42).

A condensed statement of each individual account is as follows:

* * * * * * * * *

Exhibit 13.

ORDER.

Filed June 23, 1913.

This day came A. G. Ronald, Special Master herein, and presented to the Court his report on the matters re-

ferred to him under an order entered in this cause on the 2d day of November, 1912, which report is now filed and laid over until the 14th day of July, 1913, for exceptions. The clerk is directed to note the filing of said report on the equity docket in this cause, which is done.

It is further ordered by the Court that on the motion of the City of Louisville, the Special Master is directed to postpone the hearing of the matters referred to him under an order entered herein on the 10th day of March, 1913, until the 15th day of September, 1913, and all parties are given leave on or before said date to apply to the said Court for a further postponement if it shall appear to them advisable.

Exhibit 14.

EXCEPTIONS OF COMPLAINANT TO THE REPORT OF THE MASTER COMMISSIONER FILED IN THIS COURT ON JUNE 23, 1913.

Filed July 12, 1913.

First. Complainant excepts to the report of the Master Commissioner stating the amounts charged by complainant to its Louisville subscribers for exchange service from March 8, 1909, to June 30, 1912, whereas the Master should have stated separately the amounts charged its subscribers from March 8, 1909, to April 25, 1911, that being the date upon which the final decree in this Court was rendered sustaining the appeal and awarding a perpetual injunction.

The Master should, therefore, have reported the amounts charged subscribers in excess of ordinance rates from March 8, 1909, to April 25, 1911, and then stated

separately the amount charged subscribers from the latter date to June 30, 1912.

Second. Complainant excepts to the report of the Master because it does not show what service was rendered by complainant to its subscribers for the amounts paid by them and received by complainant from March 8, 1909, to June 30, 1912.

For these and other reasons to be shown on the hearing, complainant excepts to the report of the Master filed on June 23, 1913.

Respectfully submitted,
HUNT CHIPLEY,
WM. L. GRANBERY,
HUMPHREY, MIDDLETON & HUMPHREY,
Counsel for Complainant.

Exhibit 15.

MOTION.

Filed July 12, 1913.

Comes the defendant, the City of Louisville, Kentucky, and moves the Court for an order extending the time within which exceptions may be filed to the report of the Special Master, filed herein on June 23, 1912, until November 1, 1913, or until after the Supreme Court of the United States has passed upon the matters now pending before it and involved in two petitions for a writ of mandamus against the judge of this Court, one being styled In re City of Louisville, Kentucky, and the other being styled In re A. Engelhard & Sons Company.

PENDLETON BECKLEY,
Attorney for Defendant.

Exhibit 16.

MOTION.

Filed July 12, 1913.

Comes the intervening petitioner, A. Engelhard & Sons Company, and moves the Court for an order extending the time within which exceptions may be filed to the report of the Special Master, filed herein on June 23, 1912, until November 1, 1913, or until after the Supreme Court of the United States has passed upon the matters now pending before it and involved in two petitions for a writ of mandamus against the judge of this Court, one being styled In re City of Louisville, Kentucky, and the other being styled In re A. Engelhard & Sons Company; and in support of said motion, your petitioner refers to and makes a part of this motion the affidavit of C. B. Blakey, filed herein on the 20th day of June, 1913.

C. B. BLAKEY,
Attorney for Intervening Petitioner.

Exhibit 17.

ORDER OVERRULING MOTIONS TO EXTEND THE TIME FOR FILING EXCEPTIONS.

Entered July 14, 1913.

The Court being now sufficiently advised of the motion of the City of Louisville, made herein on Saturday, July 12, 1913, for an order extending the time at least until November 1, 1913, for filing exceptions to the report filed herein on June 23, 1913, of Special Master A. G. Ronald, and also being sufficiently advised of a similar motion

made at the same time by A. Engelhard & Sons Company, delivered its opinion thereon in writing, which is filed, and pursuant thereto it is ordered, adjudged and decreed that each of said motions should be, and is, overruled and denied.

Exhibit 18.

OPINION ON MOTION TO EXTEND TIME FOR EXCEPTIONS.

Filed July 14, 1913.

The defendants, City of Louisville and A. Engelhard & Sons Company, on Saturday, July 12th, each separately moved the Court to enter an order extending the time, at least until November 1, 1913, for filing exceptions to the report of the Special Master A. G. Ronald, Esq., filed herein on June 23, 1913. After all that has been done in this case and the adequate opportunity that has been given, to all parties in interest to acquire full knowledge and to act thereon, the Court is of opinion that there is no sound reason for extending the time as moved for. Each of said motions, for that reason, will be denied and overruled.

WALTER EVANS, *Judge*.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 12, Original.

IN RE A. ENGELHARD & SONS COMPANY. *Petitioner.*

NOTICE.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky.

SIR:

You are hereby notified that the petitioner in the above styled cause will, on Monday, November 10, 1913, when motions are called for in the above styled Court, move that Court for an order striking from the response filed herein on October 14, 1913, that portion of said response which begins at the second paragraph on page 12 thereof with the words, "The petitioner consented," etc., and through pages 12, 13, 14, 15, 16, 17 and down to the center of page 18, ending with the words, "no difficulty about giving authority to petitioner"; for the reason that all the said portion of the response is impertinent and scandalous.

CLAYTON B. BLAKEY,
HUSTON QUIN,
Counsel for Petitioner.

Notice accepted November 1, 1913.

ALEXR. POPE HUMPHREY,
For Respondent.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 12, Original.

IN RE A. ENGELHARD & SONS COMPANY, *Petitioner.*

MOTION TO STRIKE OUT PORTIONS OF THE RESPONSE FILED HEREIN ON OCTOBER 14, 1913, AS IMPERTINENT AND SCANDALOUS.

Comes the petitioner, A. Engelhard & Sons Company, and moves the Court for an order striking from the response filed herein on October 14, 1913, all that portion of said response which begins at the second paragraph on page 12 thereof with the words, "The petitioner consented," etc., and through pages 12, 13, 14, 15, 16, 17 and down to the center of page 18, ending with the words, "no difficulty about giving authority to petitioner"; for the reason that same is impertinent and scandalous.

CLAYTON B. BLAKEY,
HUSTON QUIN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 14, Original.

IN RE A. ENGELHARD & SONS COMPANY, *Petitioner.*

MOTION TO FILE EXHIBITS.

Comes the petitioner, A. Engelhard & Sons Company, and tenders herewith copies of certain pleadings and papers which have been filed since this proceeding was instituted, and which have become a part of the record in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in the petition, and which are pertinent on the hearing of the motion for the writ of mandamus, and moves the Court for an order filing said exhibits as a part of the petition.

CLAYTON B. BLAKEY,
HUSTON QUIN,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 17, Original.

IN RE A. ENGELHARD & SONS COMPANY, *Petitioner.*

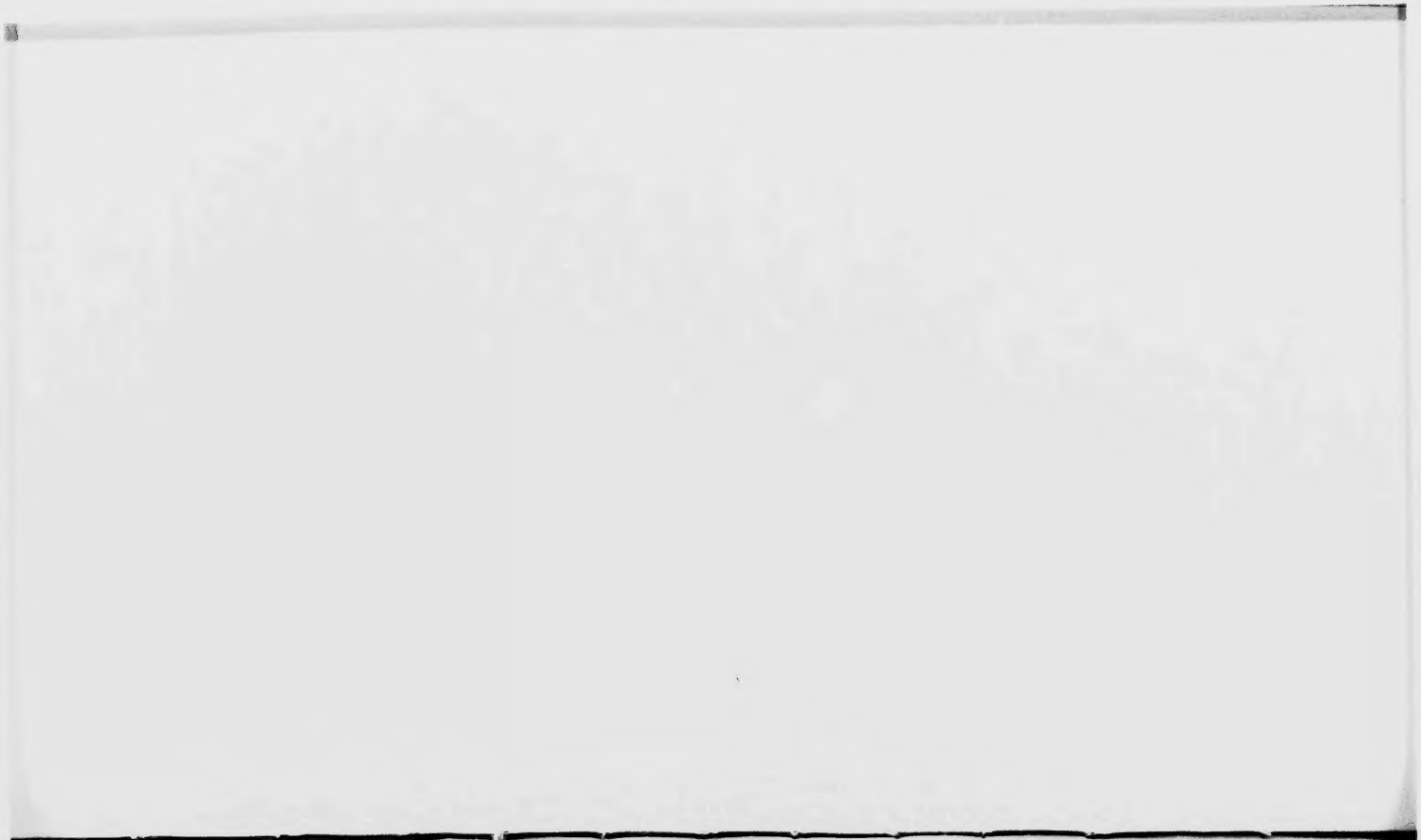
NOTICE.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky—Sir:

You are notified that the petitioner in the above styled cause will on October 13, 1913, or on the day following when motions are called for in said Court, move the said Court for an order allowing it to file as exhibits with the petition certain pleadings and papers which have been filed in the case of Cumberland Telephone & Telegraph Company v. City of Louisville, referred to in said petition and which have become a part of the record in said case since the above proceeding was instituted.

CLAYTON B. BLAKEY,
HUSTON QUIN,
Counsel for Petitioner.

Notice accepted:
HUNT CHIPLEY,
ALEXR. P. HUMPHREY,
WM. L. GRANBERY.



IN THE

Supreme Court of the United States

OCTOBER TERM 1913

ORIGINAL PROCEEDING No. 12.

IN RE A. ENGELHARD & SONS CO., Petitioner

BRIEF FOR PETITIONER

CLAYTON B. BLAKEY
HUSTON QUIN
Counsel

COURIER-JOURNAL JOB PTG. CO., LOUISVILLE

Supreme Court of the United States

No. 12 Original.

OCTOBER TERM, 1913.

IN RE A. ENGELHARD & SONS COMPANY, *Petitioner.*

BRIEF FOR PETITIONER.

May it Please the Court:

The questions arising in this case are these:

1st—Where the rights of more than seven thousand persons, constituting a class, all having a common or general interest, are to be adjudicated, none of them being before the Court, was it the duty of the Court to permit one of inervene and represent all?

2d—Where the trial Judge, under such circumstances, refused to permit intervention, should this Court issue its writ of mandamus commanding him to permit such intervention?

The facts briefly stated are these:

The Cumberland Telephone and Telegraph Company filed a Bill of Complaint and obtained the issuance out of the United States District Court for the Western District of Kentucky of a restraining order, enjoining the City of Louisville and all other persons from attempting to enforce the provisions of a certain rate ordinance of the City of Louisville. The restraining order was, on final hearing,

converted into a perpetual injunction. On appeal to this Court the decree of the District Court was reversed. (225 U. S., 430.) When the mandate of this Court went down, the District Court, on motion of the City, entered an order appointing a Master to ascertain what amounts had been collected by the Telephone Company in excess of the rates fixed in the ordinance, with a view of requiring the Telephone Company to pay same into Court for distribution among those entitled thereto. The City of Louisville was entitled to no part of the sum which might be paid into Court under his proceeding (see petition, page 9), and A. Engelhard and Sons Company, a patron of the Telephone Company, which had paid sums in excess of the ordinance rate, tendered its intervening petition, setting up that fact and asking the Court to permit it to intervene and represent all the patrons of the Telephone Company who were entitled to restitution. The District Court allowed Engelhard to become a party to the suit and his intervening petition to be treated, not as an intervening petition, but as Engelhard's individual claim to a part of the fund to be distributed. He refused to permit the intervening petition to be filed as an intervening petition, or the petitioner to sue for or represent the other patrons of the Telephone Company. (See Exhibit C with petition.)

Whereupon this petition was filed, seeking a writ of mandamus out of this Court commanding the District Judge to vacate the order above referred to, and to enter an order permitting the said petitioner to sue for and represent the patrons entitled to restitution.

RIGHT TO INTERVENE.

As to the right of the petitioner to represent the other patrons of the Telephone Company, attention need only be called to Rules 37 and 38 of the Rules of Practice for Courts of Equity, promulgated by this Court on November 4, 1912. Those rules went into effect on February 1, 1913, and the intervening petition in question was tendered on February 15, 1913.

Rule 38 is as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, one or more may sue or defend for the whole."

It is not disputed that all of the patrons of the Telephone Company who are entitled to restitution have a common and general interest and constitute a class. The petition charges that there are more than eight thousand of them. Since the petition was prepared, the Master's report has been filed, which shows that there are between seven and eight thousand who are entitled to restitution.

Rule 37 provides that:

> "Every action shall be prosecuted in the name of the real party in interest."

The petitioner in this case and those it seeks to represent are certainly the real parties in interest. The City of Louisville is simply acting *pro bono publico* and has no real interest in the litigation. Except for the fact that it had been instrumental in bringing about a situation under which the real parties in interest became entitled to res-

titution, it would not even be a proper party. If one of the public service corporations of the City of Louisville, independently of any litigation, should collect from a citizen of Louisville a rate in excess of that fixed by ordinance, unquestionably the City would be powerless to sue for or recover such excess.

In the case of the City of Georgetown v. The Alexandria Canal Co., 12 Peters, 100, this Court, in declining to hold that a municipality, as such, had a right to sue to protect the private interests of its citizens, said:

> "There are indeed cases, in which it is competent for some persons to come into a court of equity, as plaintiffs for themselves and others, having similar interests; such is the familiar example of what is called a creditor's bill. But in that, and all other cases of a like kind, the persons, who by name, bring the suit, and constitute the parties on the record, have themselves an interest in the subject-matter, which enables them to sue, and the others are treated as a kind of co-plaintiffs, with those named, although they themselves are not named; but in this case, it has been already said, that the appellants have no such interest as enables them to sue in their own name, and consequently the whole analogy fails."

Again, Rule 37 provides that:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention."

Unquestionably, Engelhard, and those he seeks to represent claim an interest in the litigation. If there was any occasion for the investigation—for the appointment of a Master—it was to establish the rights of those whom the petitioner seeks to represent. The re-

sult of the Master's report will be to establish their rights. It is entirely proper for Courts, under certain circumstances, to establish the rights of persons who are not in fact before the Court, but certainly it is never proper to determine finally the rights of such persons unless they are at least represented by someone having a similar interest. For this reason, and no doubt because of abuses under the general equity practice, this Court saw fit to promulgate rules specifically enjoining on District Courts the duty of permitting one or more to sue for many, when the many constitute a class so numerous as to make it impracticable to bring them before the Court.

That Rule 38 only reiterated the recognized principle of equity practice is shown by the language of this Court in Smith v. Swormstedt, 16 Howard, 302:

> "The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others."

Clearly, then, the District Court should have permitted the petitioner to intervene and represent all of the patrons of the Telephone Company who were entitled to restitution.

But the Respondent contends that there was no occasion for permitting the petitioner to represent these patrons, because:

(1) Rules 37 and 38 do not apply.

(2) The City of Louisville is diligently seeking to bring about the restitution sought by the petitioner, and

(3) Because as Judge he only exercised his discretion in refusing to allow intervention, and this Court cannot control his exercise of discretion.

These reasons will be discussed in their order.

I.

RULES 37 AND 38 APPLY.

The Respondent says that rule 38 applies only to the beginning of an action; that it does not apply to "a litigation which had progressed for a long time between proper parties." The Respondent loses sight of the fact that the proceeding to obtain restitution was begun at the time Engelhard first presented his petition to intervene. Even now the rights of the parties in the restitution proceeding have not been adjudicated.

II.

THE CITY IS SEEKING RESTITUTION.

Unquestionably, the City is seeking to bring about the restitution desired. It has already been pointed out, however, that the City has no monetary interest in the sum to be restored. It is acting *pro bono publico*, merely. No doubt, the City will do everything in its power to protect the rights of its citizens, but that is not the criterion by which to determine whether the parties in interest have the representation to which they are entitled. Equity practice and the rules promulgated by this Court recognize the fact that the rights of persons should not be passed upon by a Court unless such persons are either before the Court or are represented by someone who is

interested similarly with them. However efficiently and earnestly the City may seek to obtain restitution, the fact remains that what it does is done solely because of its interest in the welfare of its citizens. If the rulings of the District Court are in any respect adverse to the interests of the telephone patrons, the City may or may not see fit to appeal from such rulings, and if it does not see fit to do so, and no one interested is a party to the litigation, then no appeal can be taken.

Again, who is going to represent the patrons of the Telephone Company when the question arises of the amount of fees to be allowed the Master, or who shall pay those fees or the other costs of the case? From an allowance of costs no appeal lies. The City will, of course, be interested in avoiding the payment of these costs. The Telephone Company will be interested in avoiding their payment. No one will be especially interested in having the patrons of the Telephone Company escape the payment of these costs.

Under the Master's report, no interest is allowed the telephone patrons on the amounts unlawfully collected from them by the Telephone Company. This question has never been raised in the record. The patrons are entitled to have this question raised. They may or may not be entitled to interest, but certainly someone representing them ought to demand interest, and if they are entitled to it, then it should be paid to them in this proceeding.

The Telephone Company has filed exceptions to the Master's report (see Exhibit No. 14 —), which if sustained will deny to these patrons certainly a large part, if not all, of the $137,000 which has been unlawfully exacted

from them. These exceptions have not yet been passed on. If decided adversely to the interests of the patrons, the City may or may not see fit to take an appeal. Should it decide not to go to the expense of an appeal, then none could be taken, because no person in interest is in a position to apply for it.

Irrespective of these considerations, the fact remains that the purpose of the rule is to avoid adjudicating the rights of litigants unless they are before the Court, either in person or by representation. The representation required by the rule is by one who has an interest similar to those who are not made parties to the suit.

III.

RESPONDENT'S DISCRETION.

But the Respondent says he only exercised the discretion possessed by him as Judge in refusing intervention, and that this Court cannot control his exercise of discretion.

In the first place, there is nothing in the rule which indicates that this Court intended to leave to the discretion of the District Court this right granted to litigants. The rule provides that when the interest is common, "one or more may sue or defend for the whole." **Note, this rule does not provide that "one or more may be permitted to sue, etc.," but "may sue." The word "may" confers no right on the Court, but applies solely to the rights of interested parties.** The rule clearly confers on one of a class the right to sue for all, and when he seeks to do so the duty is imposed on the Court to permit it.

In passing on a similar rule this Court said:

> "As no discretionary power was reserved to the trial judge, he could not dispense with this rule of Court. As was said in Thompson v. Hatch, 3 Pick. 512:
>
> "'A rule of the Court thus authorized and made has the force of law, and is binding upon the Court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. * * * *The Courts* may rescind or repeal their rules, without doubt; or, in establishing them, *may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it*, until it is repealed by the authority which made it.'" (See Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 608.)

Added force is given to the interpretation here contended for when attention is called to the rule (48) which was in force when the present rules were adopted. Rule 48 provided as follows:

> "Where the parties on either side are very numerous, and cannot without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court *in its discretion may* dispense with making all of them parties and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties."

Here it will be noted that some discretion was left to the Court. Similar language, no doubt, would have been used in Rule 38 if this Court intended to leave the question to the discretion of the Court. *Moreover, a Court's discretion which cannot be reviewed pertains to matters of prac-*

tice and not to fixed rights of litigants. A party in a proper suit is entitled to have his cause heard and determined by a District Court. Should the District Judge refuse to hear such a case, and on a mandamus proceeding being instituted in this Court, respond that in so refusing he exercised his discretion, such a response would, we imagine, meet with slight consideration from this Court. The authorities pertinent to this phase of the response will be found on pages 20 to 27 of this brief.

But even where a Court may exercise a discretion, the law requires that he shall not abuse that discretion.

In Rio Grande Irrigation Co. v. Gildersleeve, *supra*, this Court said:

> "A motion, even if made within the time prescribed by the rule, to set aside a judgment, is addressed to the discretion of the trial Court, and where the exercise of that discretion has been approved by the Supreme Court of the territory, we should not feel disposed to overrule those Courts, *unless misuse or abuse of discretionary power plainly appeared.*"

See also Throckmorton v. Holt, 180 U. S. 565; Rucker v. Balls, 133 Fed. 658; Great Northern R. Co. v. Herron, 136 Fed. 49; Silverman v. Baruth, 58 N. Y. S. 663; McElroy v. Minnesota Horse Co., 119 Wis. 116; Jarrett v. Jarrett, 11 W. Va. 584.

DID THE RESPONDENT ABUSE HIS DISCRETION IN REFUSING TO PERMIT ENGELHARD TO INTERVENE FOR ALL?

Respondent says that he exercised his discretion and refused intervention because the contract of employment between Engelhard and his lawyers was tainted with

champerty. Here for the first time Respondent gives this reason for refusing to permit Engelhard to intervene. **The City had welcomed Engelhard in the case. The Telephone Company had not opposed it by sign or word** (see Rec. Appeal Case 538, pp. 37-42.) No one opposed it but Respondent, and he refused to permit it for the following reasons as stated in his opinion:

> "Claims such as that of the petitioner can have no basis unless and until it is ascertained in this action that the ordinance of the City of Louisville attacked by the complainant is valid * * * The presence of individual citizens, therefore, is altogether unnecessary in the contest between the parties in this action." (See opinion filed by Respondent as Exhibit "A" with his response.)

But granting that the taint of champerty is sufficient to justify a Court in denying a party the right to intervene, it is respectfully submitted that a Court can take cognizance of the fact that the contract of employment is tainted with champerty only where that fact is specially pleaded. (See Cyc, Vol. 6, p. 882.) In the case at bar there is not only no plea of champerty, but not even any opposition to intervention on that ground or on any other.

What would be said of a Judge who, without even a plea of champerty, should dismiss an ordinary damage suit because he had heard that the case had been solicited by the plaintiff's lawyer, and that the contract of employment was champertous?

This Court has held that champerty is not a proper plea except in a suit brought by a party seeking to enforce the champertous contract. (See Burns v. Scott, 117 U. S. 588; Boone v. Childs, 10 Pet. 177.)

The champerty charged by Respondent in substance is this:

(a) Someone (not named) promised Engelhard indemnity against "expenses to be incurred" (the nature of the expenses not being disclosed).

(b) Messrs. Blakey and Quin caused letters to be sent to the telephone patrons, which letters purported to emanate from a committee of citizens, and by which letters the patrons were urged to employ Messrs. Blakey and Quin, the former city attorney and his assistant, to continue the fight for low telephone rates.

ENGELHARD'S EXPENSES.

As the Respondent fails to charge who has indemnified Engelhard for his expenses, or even what expenses he is indemnified against, we do not see how that part of the response can be pertinent. If the other patrons of the Telephone Company—the parties in interest—have so indemnified him, then certainly he is not subject to criticism. Would any Court say that a stockholder suing to right a corporate wrong should be turned out of Court because the other stockholders had agreed to bear the expense of the litigation, or even because the lawyer for such stockholder suggested that it might be well for the other stockholders to be invited to join in defraying the expenses of the suit, including a fee for the lawyer?

In so far as the letters sent out by the committee of citizens is concerned, it is not charged that Engelhard had any connection with sending out those letters. It is not charged that Engelhard is connected with the committee or with the letters in any manner. We are there-

fore at a loss to see why Engelhard should be refused the right to enter the case, because certain citizens sent out the letters in question.

It is not charged that a single patron of the Telephone Company ever employed Engelhard's lawyers as a result of those letters.

These considerations, we think, sufficiently answer the charge of champerty, but we are compelled to carry it further.

First, we think it pertinent to direct the Court's attention to the situation that has been created—a Judge of a District Court of the United States in a paper of so serious a nature as his response to a writ from this Court wherein he gives his reasons for not obeying the elementary rules laid down by this Court for the guidance of inferior jurisdictions, has taken the grave step of interpolating into that response irrelevant matter designed to reflect upon officers of this Court. This need not be elaborated. We leave the Court to draw its own inference.

Second, we feel further that the action of the Respondent in interpolating this irrelevant matter has made it our duty, not only to ourselves, but to the citizens of Louisville who are attacked by him, to call the Court's attention to certain facts in the record which probably explain his attitude.

(Incidentally we may say that a motion has been made to strike out the part of the response here referred to which motion, we think, should be sustained, but if that motion is overruled, then the following six pages of this brief are pertinent).

When the bill was filed in 1909 the Respondent, as District Judge, issued a restraining order without notice to the defendant. Three weeks later the motion for a temporary injunction was argued and taken under submission. Respondent having delayed action on this motion for three months, and refused the City's repeated request to pass on the motion (see Rec., 761, Oct. Term, 1911, pp. 56-57), the City moved the Court for an order requiring the Telephone Company either to pay into Court the excess collections made from its patrons, or to give bond for its restitution. The Telephone Company resisted this motion, and through its counsel submitted an order which it agreed might be entered, and whereby it agreed to keep an "accurate account of all sums of money paid to it by subscribers to its service," and in case the ordinance was adjudged not confiscatory, then "the complainant shall be obliged to pay to each of its subscribers, respectively, such excess payments upon demand, and in case of refusal, this right may be enforced by rule to be issued in this suit" (see Rec., No. 538, p. 16).

The Respondent not only overruled the City's motion, but even refused to permit the order submitted by the Telephone Company to be entered. He gave no reason at the time for his action, but subsequently, and after the mandate of this Court went down, said:

> "The Court might at the outset have required the Company to have given just such a bond as would cover all such contingencies, but the Court, as Judges sitting by themselves sometimes do, had an over-confidence, as it developed, in the accuracy of its judgment in this case.
>
> **"It never for a moment doubted the accuracy of it or the invalidity of the ordinance.**

"I would have been glad if the Supreme Court had convinced me that I was wrong, **but the most that can be claimed for the opinion of the Supreme Court, speaking respectfully, is, that it arbitrarily reversed this Court without giving an opinion.**" (See Record, 538, p. 26.)

In reality then, Respondent's reason for declining to enter the order submitted by the Telephone Company was because he knew he was going to declare the ordinance void, and that there could never be any occasion for restitution.

We pass over the fact that the Respondent is on record as saying that he presumed from the time the Bill of Complaint was filed, that the rate ordinance in question was invalid, losing sight entirely of the fact that the law required him to presume the ordinance to be valid until it was shown to be clearly confiscatory.

Mr. Henry Burnett, who had been appointed Special Master, heard the evidence and found therefrom that the Telephone Company could earn an ample return on its investment under the ordinance rates. The Respondent set this finding aside and declared the ordinance void. This Court reversed the decree entered by Respondent, and when the mandate came down, *Respondent, after announcing that he had never for a moment doubted that the ordinance was invalid, and that the opinion of this Court had not convinced him that he was in error* (see Rec. 538, p. 26), *proceeded to displace Mr. Burnett as Special Master and, over the protest of the City, and in violation of Judicial Code, Sec.* 68, *appoint his clerk as Master.* (See Rec. 538, pp. 21, 22, 56.) Instructions were given the clerk to supervise the operations of the telephone plant for a year or two and report whether the company was

making money under the ordinance rates. This was done, as stated by the Respondent, with the view to trying again the question of the validity of the ordinance.

But the most remarkable fact in the entire proceeding was that all of this was done without a motion to that effect having been made by any party to the suit, or a suggestion having been made that possibly this Court by its opinion intended to convey any such meaning.

As stated by Respondent, much publicity had been given the facts in this case. (Response, p. 15.) Many patrons of the Telephone Company thought that in view of the Respondent's attitude and rulings, all of which were reported in the newspapers from time to time as matters of public interest, and in view of the fact that the term of office of the attorneys who had represented the City in this litigation for four years and from its beginning, was about to expire, that it was important to secure their services in any future litigation over the same ordinance. Accordingly a committee of citizens composed of Mr. William Heyburn, president of the Belknap Hardware Company, (the second largest hardware house in the United States), Maj. John H. Leathers, president of the Louisville National Banking Company, and Mr. L. S. Bernheim of the Bernheim Distilling Company, (one of the largest in Kentucky), in a letter which is copied into the response urged the telephone patrons to employ the writers of this brief to aid in such future litigation.

The response charges that we were the instigators of this scheme, and that he (the respondent) was justified on this account in refusing to allow our client Engelhard, to represent the other patrons. There is nothing here for Engelhard to deny. The charge is against Engelhard's

lawyers and not against him. Even if the charge were against him we would not counsel a reply because the matter set up is wholly immaterial and conceded to be so by Respondent on page 16 of the response. Moreover we do not care to be a party to the trial of such an irrelevant issue before this Court.

Had any party to the litigation while it was pending in the District Court, objected to Engelhard coming into the case for the reasons stated by the Respondent, then an opportunity would have been given us to answer those charges. No such charges were made, however, and we meet them for the first time in this Court in a proceeding where obviously the facts cannot be brought out.

In what we have had to say in this brief, we have followed the record (except where we explain who the gentlemen are who signed the letter referred to in the response), and we do not think it proper to depart from that course even to defend ourselves from the unwarranted charge made by Respondent. As members of this bar, however, we want to assure Your Honors that an investigation of our conduct in connection with the matters referred to in the response will disclose nothing which does not comport with the strictest ethics of the profession.

But Respondent also says that he was influenced to refuse intervention on the part of Engelhard, because he felt impelled to protect the telephone patrons against legal fees which Engelhard's lawyers might be entitled to for representing them.

We therefore have this situation:

The patrons want Engelhard to intervene to aid in upholding the ordinance in question and in having restored to them *all of the sums unlawfully exacted from them*

under an order erroneously issued by the Respondent: whereas Respondent says in effect that he will not permit intervention, because he wants to save to the patrons 25 *per cent of the sums unlawfully exacted* from them under the order in question.

Respondent says the writers of this brief will get $34,000.00 in fees if Engelhard is permitted to intervene, and yet he does not say that a single patron other than Engelhard has employed us. If our fee is a matter of contract, then the Respondent has no concern with it. If it is dependent on an allowance from the Court, then we think no fear need be entertained of its being in excess of our just deserts.

That which lies back of the response and permeates it throughout is shown not only by its general tenor, but specifically by the following language in the response filed in the case of the City of Louisville on petition, being Original No. 11, on the docket of this Court:

> "Respondent may suggest that it has often occurred to him that unless the order (retrying the case) shall thereafter be executed * * * before any distribution thereof is actually made to the 7,735 customers of the Telephone Company, the latter will be helpless in the practical impossibility or recollecting from that great number of persons the several sums thus distributed to them and to which they will not be entitled if the ordinance shall ultimately be found to be confiscatory and void, and especially will this be true as to 25 per cent thereof sought by certain attorneys in the manner stated in detail in the response to the petition of A. Engelhard & Sons Company."

In other words the Respondent says that if the Telephone Company is required to refund to its patrons the sums unlawfully exacted from them, and if it should there-

after he held that the ordinance is invalid, then the company will be entitled to recover the amounts so returned to its patrons; in which event (says Respondent) the company will have great difficulty in recovering from us the 25 per cent paid us as fees. That is to say, the Respondent wants this Court to think that we are so irresponsible financially that even a rule issued against us by a Federal Court would be of no avail in the matter of recovering money once paid to us.

Again, on page 13 of the response in this case, the Respondent says that the letters referred to in the response were sent out by us "to each of the thousands of customers of the Telephone Company (a list of whom they had procured in the preparation of the suit referred to.") Now, when it is pointed out that that list of subscribers was filed in this case and even copied in the record (No. 761) which came to this Court, there is no explanation of the above language except that the Respondent wished thereby to insinuate that we had been false to our official trust and were in some underhanded way trying to reap an advantage from our former positions which was inconsistent with the fiducial nature of those positions.

To sum up our contention, it is this:

(1) Under the Rules of Practice a District Court is without discretion in a case like this to refuse to permit one of a class to intervene and represent all.

(2) If a Court has such discretion, then the Respondent has shown the existence of no facts constituting a legal ground for the exercise thereof. Not only does the response fail to show the existence of any legal grounds for the exercise of his discretion, but the fact that no party to the litigation opposed Engelhard's intervention or will

be prejudiced thereby, the fact that Respondent has gone out of the record to make an unwarranted and irrelevant attack on Engelhard's lawyers, the tenor of the Respondent's remarks concerning this Court's opinion after the mandate came down, and the other facts in the record set forth in this brief, extorts the ineluctable conviction that his exercise of discretion was not based on legal grounds.

MANDAMUS THE ONLY APPROPRIATE REMEDY.

The act of Congress granting to this Court the power to issue writs of mandamus provides in effect that this Court may issue such writs, addressed to inferior Courts, wherever the practices and usages of law warrant it.

The Constitution seems to confine the authority of this Court in this respect to cases where its appellate jurisdiction is involved. Chief Justice Marshall, in ex parte Crane, 5 Peters, 190, held, however, that a writ of mandamus could be issued to an inferior Court for the purpose of supervising its conduct, and to compel the inferior Court to do whatever was consistent with right and justice.

Chief Justice Waite, in ex parte Cutting, 94 U. S. 20, said:

> "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance, and who has no other adequate remedy."

The petitioner's right to the writ depends, therefore, on the answers to the following questions:

(1) Had the petitioner a clear right to have its intervening petition filed, and to represent the other patrons

of the Telephone Company who were entitled to restitution?

(2) Did the Respondent violate a plain and positive duty in denying that right?

(3) Has the petitioner any adequate remedy other than the issuance of a writ of mandamus? and

(4) Will the writ, if issued, be in aid of this Court's appellate jurisdiction?

INTERVENTION SHOULD HAVE BEEN ALLOWED.

That the petitioner was entitled to intervene and represent the other patrons of the Telephone Company and that the Court violated a plain duty in refusing to permit such intervention has been discussed in the preceding pages of this brief, and we submit that under the facts as presented in the record the petitioner has clearly shown that it was entitled to so intervene. Such being the case, the Respondent violated his duty and the Rules of Practice by refusing to permit such intervention.

MANDAMUS THE PROPER REMEDY.

The refusal of a Court to permit a person to intervene in a pending cause is not a final order from which an appeal can be taken.

See:
Ex parte Cutting, 94 U. S. 14.
Credits Commutation Co. v. United States, 177 U. S. 311.

The only other remedy which the petitioner could have would be the right to proceed in some other tribunal to require the Telephone Company to make restitution. Nec-

essarily, the District Court having taken jurisdiction and entered an order looking to the distribution of this fund, no other tribunal would have jurisdiction to require restitution. The fund will be paid into Court under orders of the District Judge and will be distributed among those patrons of the Telephone Company who are found to be entitled thereto under orders and decrees entered by the District Judge. The decree of the District Judge on this branch of the case will be that the Telephone Company has exacted from its patrons certain sums in excess of the ordinance rate, and the Telephone Company will be ordered to pay into Court the sums so exacted. The decree will further be that the fund so paid into Court shall be distributed among the patrons in a particular manner—so much to A, so much to B, so much to C. Unquestionably, no patron of the Telephone Company who is entitled to $100.00, and who under that decree may be allowed only $50.00 will be permitted to recover the additional $50.00 in any other tribunal or through any other proceeding Such a decree as the District Court will enter will be final as to the rights of all parties who paid to the Telephone Company sums in excess of the ordinance rate. We can conceive of no other remedy which the petitioner might adopt. He cannot appeal from the order of the Court refusing intervention and he can apply to no other tribunal for relief. He is deprived not only of any adequate remedy other than a writ of mandamus, but is deprived of any remedy whatever.

This is not a case in which the petitioner is asserting a right to a part of a fund in Court which will be dissipated and lost unless it is permitted to intervene and have its

right to the fund adjudicated. In such a case the refusal to permit intervention would be a final order, because it would finally deprive the petitioner of all opportunity to participate in the fund. Such a situation as this was discussed in the case of Credits Commutation Co. v. United States, 177, U. S., 311. In that case the Court said:

> "It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in Court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief."

In the case at bar the interventing petitioner alleged that the Telephone Company was indebted to eight thousand of its patrons on account of excessive payments made under an injuction erroneously granted by the Court; and the petitioner, in its own behalf and in behalf of the other patrons, asked

(a) For an order permitting it to intervene.

(b) For an order permitting it to represent all the class of which it was one.

(c) For an order requiring the Company to pay into Court the amount unlawfully collected.

(d) And finally for a decree determining the names of all those who were entitled to participate in the amount

so paid in, and the respective sums to which they were entitled.

The petitioner is not seeking for itself, or for anyone, recovery of a specific portion of the fund. *The order denying it the right to intervene is not an order which actually or in effect determines the right of anyone to any part of the fund.* The order denying it the right to intervene does nothing more than decree that the rights of the parties in interest shall be adjudicated without having those parties before the Court. Such an order is not a final order. It denies to none of the parties in interest "all right to relief."

The order in question, therefore, is either not a final order from which an appeal can be prosecuted, or if it is a final order, then an appeal does not confer on the petitioner an adequate remedy.

Assuming that it is not a final order, does such fact entitle the petitioner to a writ of mandamus?

We think a review of the opinions of this Court in similar cases answers this question in the affirmative.

In the case of Railroad Co. v. Wiswall, 23 Wallace, 507, this Court said:

> "The order of the Circuit Court remanding the cause to the State Court is not a 'final judgment' in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

In the case of in re Hohorst, Petitioner, 150 U. S., 663, this Court held that an order dismissing a suit as to one of several defendants was not a final order, and that no appeal could be taken therefrom; that the only remedy

which the plaintiff had was a writ of mandamus out of this Court commanding the trial Judge to vacate the order dismissing as to the one defendant, and to proceed to try the case.

Assuming that the order refusing intervention was a final order, from which the petitioner could appeal, even such an appeal would not be an adequate remedy, because the Master's report would have been filed and approved by the Court, and the money paid into Court and distributed before the appeal could be disposed of. If the petitioner were successful on appeal it would not mean that the District Court would either be required, or have the authority, to set aside the order approving the Master's report and allow the petitioner to file exceptions thereto. In order to deny the writ, the appeal, if allowable, must be an adequate remedy.

In the case of Fourth National Bank v. Johnson, 51 L. R. A., 133 (103 Wis., 591) the Supreme Court of Wisconsin said:

> "The general rule of law undoubtedly is that mandamus will not lie where there is a remedy by appeal or writ of error. But the remedy by appeal must be substantially adequate in order to prevent relief by mandamus. If it appears that an appeal will not be an adequate remedy, mandamus may still issue, in the discretion of the Court."

THE WRIT IS ASKED IN AID OF THIS COURT'S APPELLATE JURISDICTION.

In the case of Marbury v. Madison, 1 Cranch, 173, this Court said:

> "It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms,

> and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.
>
> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a case already instituted, and does not create that cause."

The petitioner in the case at bar presented to a District Court a petition in a cause properly pending in that Court. The petitioner should have been permitted to represent the parties in interest. The amount involved was sufficient to entitle the petitioner to an appeal if the rights he represented were denied. By the refusal of the District Judge to permit intervention a situation was created whereby the petitioner was denied the right to appeal to this Court. *The issuance of the writ, therefore, commanding this District Court to permit intervention will aid the appellate jurisdiction of this Court, in that it will make it possible for a cause to be tried in the District Court, of which cause this Court has appellate jurisdiction.*

In ex parte Bradstreet, 7 Peters, 654, Chief Justice Marshall said:

> "Every party has a right to the judgment of this Court in a suit brought by him in one of the inferior Courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000."

In the case of In re Connaway, 178 U. S., 421, the facts showed that one of the defendants died before process was had on him, whereupon the complainant asked that the executor of the decedent be made a party defendant. This the District Court denied, whereupon a petition for writ of mandamus was filed in this Court, asking that the Dis-

trict Court be required to enter an order making the executor a party defendant. In other words, this Court was asked to command the District Court to bring before it a proper party to the litigation. This Court sustained the petition and granted the writ. The only difference between the two cases is that in the Connaway case the plaintiff was seeking to bring before the Court a proper party, whereas in the case at bar a necessary party is seeking to compel the Court to allow it to enter the case. If the writ of mandamus was granted in the one case it is certainly appropriate in the other.

In the case of ex parte Parker, 120 U. S. 737, and in the case of Hollon Parker, Petitioner, 131 U. S. 231, this Court issued its writ of mandamus to compel the subordinate Court to take jurisdiction and try a cause. In the first of the above cases the Chief Justice, speaking of the province of the writ of mandamus, said:

> "That writ properly lies in cases where the inferior Court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof."

The foregoing considerations, we think, sufficiently answer all questions raised by the Respondent, and we respectfully submit that the writ should be issued as prayed.

Respectfully submitted,

CLAYTON B. BLAKEY,

HUSTON QUIN,

Attorneys for Petitioner.

NOTE.—Respondent says that if the original case is not to be kept open for the purpose of retrying the validity

of the ordinance, then it should not be kept open for the purpose of restitution.

It is our contention that the patrons of the Telephone Company have paid $137,000 in excess of what they should have been required to pay, and that that sum was paid under an erroneous order of the District Court. That sum, therefore, was wrongfully taken from one party to a litigation and handed over to another party who was not entitled thereto. Under such circumstances a Court of Equity should reach out its strong arm and restore to the rightful owners the sums so taken.

See:

Northwestern Fuel Co. v. Brock, 139 U. S. 216.
Brown v. Detroit Trust Co., 193 Fed. 626.
Lincoln Gas & Electric Co. v. City of Lincoln, 223 U. S. 349.
Southern Ry. Co. v. Tift, 206 U. S. 435.
Tift v. Southern Ry. Co., 159 Fed. 555.
Lamb v. Ewing, 54 Fed. 269.
Hendryx v. Perkins, 114 Fed. 828.
Baltimore Building & Loan Ass'n v. Alderson, 99 Fed. 493.
Robinson v. Alabama Mfg. Co., 67 Fed. 189.

Respondent also says that no restitution should be ordered until the ordinance is, on another trial, declared to be valid.

We contend that retrying the case has nothing to do with the right of patrons to restitution. That right is not affected by the fact that the payments in question were made while an injunction was in force. This Court has held that the injunction should not have been granted. The ordinance should therefore have been obeyed. Had it

been obeyed, the parties would not have been required to pay the $137,000 in question.

Again, the patrons are now paying the ordinance rate. If the position of Respondent is sound, then these patrons should hereafter be required to pay an additional sum to make up the losses of the Telephone Company, if hereafter the ordinance is found to be confiscatory. *A rate ordinance may be valid at one time, and, due to a change of conditions, altogether invalid and confiscatory at another time.*

12

No. 21, Orig.

Supreme Court of the United States

OCTOBER TERM, 1912

IN RE A. ENGLEHARD & SONS CO. Petitioner

PETITION FOR WRIT OF MANDAMUS AND RULE

CLAYTON B. BLAKEY
HUSTON QUIN
Attorneys for Petitioner

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912.

IN RE A. ENGLEHARD & SONS COMPANY. *Petitioner.*

Comes now A. Englehard & Sons Company, by its counsel, and respectfully moves this Honorable Court for leave to file a petition for a writ of mandamus, as in said petition prayed.

Attorney for Petitioner.

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912.

IN RE A. ENGLEHARD & SONS COMPANY, *Petitioner.*

On consideration of the petition of A. Englehard & Sons Company,

It is hereby ordered by the Court that cause be shown by the Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, before this Court at Washington, D. C., on the ——— day of ——— ———, 1913, at ——— o'clock, in the ——— noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not be granted as prayed for in said petition.

Dated, Washington, D. C., ———, 1913.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912.

IN RE A. ENGLEHARD & SONS COMPANY, *Petitioner.*

The above named petitioner, A. Englehard & Sons Company, a corporation organized and existing under the laws of the State of Kentucky, moves the Honorables the Judges of the Supreme Court of the United States, for a rule on the Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to show cause why a writ of mandamus should not be issued commanding said Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to vacate an order entered by the said Hon. Walter Evans, Judge of said Court on March 10, 1913, in a certain cause then and now pending in said Court styled Cumberland Telephone & Telegraph Co. vs. the City of Louisville, in so far as said order denies unto your petitioner the right to sue for all patrons of the Cumberland Telephone & Telegraph Company similarly situated with your petitioner and who paid the said Telephone Company during the pendency of the injunction referred to in the petition filed herewith sums in excess of the rates fixed by the City of Louisville in an ordinance of March 6, 1909; and commanding said Hon. Walter Evans, Judge of said Court to enter an order permitting your petitioner to sue for, represent, and act in behalf of all persons similarly situated with it with respect to the restitution of the sums so unlawfully collected by the said Telephone Company.

And if this cannot be done, then your petitioner prays this Honorable Court for a rule on the said Hon. Walter Evans, District Judge of the United States Court for the Western District of Kentucky to show cause why a writ of mandamus shall not be issued by the Court commanding the said Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to grant unto your petitioner the appeal prayed for from the order of March 10, 1913, in the said cause of the Cumberland Telephone & Telegraph Company against the City of Louisville then pending in said District Court, and refused by the said Hon. Walter Evans, Judge of the Court afore said; and commanding the said Hon. Walter Evans, Judge of said Court to sign and enter an order in accordance with the terms of the petition for appeal filed in said cause; and to grant to your petitioner the relief prayed for and such other and further relief in the premises as may be just.

Washington, D. C., May 24, 1913.

CLAYTON B. BLAKEY,
Attorney for Petitioner.

BLAKEY, QUIN & LEWIS,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912.

IN RE A. ENGLEHARD & SONS COMPANY, *Petitioner.*

To the Honorable Judges of the Supreme Court of the United States:

The petition of A. Englehard & Sons Company, respectively shows and alleges:

First. That your petitioner, A. Englehard & Sons Company, is a corporation organized under the laws of the State of Kentucky and conducting its business and residing at Louisville Kentucky.

Second. That the Cumberland Telephone & Telegraph Company is a corporation organized under the laws of the State of Kentucky and conducting its business and residing at Louisville, Kentucky.

Third. That the City of Louisville is a municipal corporation organized and existing under the laws of the State of Kentucky.

Fourth. That heretofore, to-wit, on the 8th day of March, 1909, the Cumberland Telephone & Telegraph Company (hereafter called the Telephone Company) filed a bill of complaint in the United States District Court for the Western District of Kentucky, wherein it sought an injunction enjoining the City of Louisville from seeking to enforce a certain rate ordinance duly enacted by the legislative body of the City of Louisville, Kentucky, on the 6th day of March, 1909, on the ground that same was confiscatory as to it; that on the same day the Telephone Company presented its said bill in person to the Honor-

able Walter Evans, District Judge of the United States for the Western District of Kentucky, whereupon the said judge without notice to the defendant granted a temporary restraining order, restraining the City of Louisville and all other persons from seeking to enforce said ordinance; that thereafter on the 28th day of March, 1909, a motion for a temporary injunction made by the Telephone Company was argued and taken under submission by the judge of said Court; that said temporary injunction was never passed upon by the Court until the final hearing of the cause, when on the 25th day of April, 1911, it was converted into a permanent injunction, perpetually enjoining the City of Louisville and all other persons from seeking to enforce the provisions of said ordinance.

Your petitioner says that the only issue involved in said cause was as to whether the ordinance above referred to, if enforced, would result in confiscating the property of said Telephone Company.

Fifth. Your petitioner says that while said temporary restraining order was in force and because of the failure of the said Honorable Walter Evans, Judge of said Court, to pass on the motion for a temporary injunction, the defendant on June 15, 1909, moved the Honorable Walter Evans, Judge of said Court, for an order requiring the Telephone Company to pay into Court all sums collected by it in excess of the rates fixed in the rate ordinance in question, and that on July 9, 1909, the said motion coming on for hearing the Telephone Company through its counsel appeared in Court and agreed that if the Court would make no order requiring the Telephone Company to pay into Court the sums collected by it in excess of the rate ordinance but would allow said restraining order to re-

main in force, then it (the Telephone Company) would agree and did agree to keep an accurate account of the amounts collected by it for telephone service in the City of Louisville, Kentucky, in excess of the rates fixed in the rate ordinance, and would, on final hearing pay said amounts into Court for distribution among those entitled thereto, provided the ordinance in question was not declared to be confiscatory; and that pursuant to said agreement the judge of said Court did refrain from making such order and did allow said restraining order to remain in force.

Sixth. Your petitioner says that after the judge of the said Court had entered a final decree perpetually enjoining the enforcement of the rate ordinance above referred to, the City of Louisville prayed and was granted an appeal to this Court from the said decree and that such proceedings were had on the said appeal that this Court on the 7th day of June, 1912, handed down an opinion, (same being reported in 225 U. S. 430), wherein the judgment of the lower Court was reversed and the cause was remanded to the District Court for further proceedings not inconsistent with the opinion of this Court.

Seventh. Your petitioner says that after the return of said case to the District Court, on motion made by the City of Louisville, the following order was entered by the Honorable Walter Evans, Judge of said Court:

> "This day the complainant, Cumberland Telephone and Telegraph Company, came by its counsel of record, as did the defendant, City of Louisville, by its city attorney, and certain motions of the said defendant made herein on September 28, 1912, coming on to be heard were argued by counsel, and the Court being sufficiently advised, it is ordered, adjudged and decreed as to the third of said motions, namely, that

one of them which, in effect, asks for an order appointing a special master to take proof and report the amount with interest, collected by the complainant from its subscribers in Louisville, Kentucky, in excess of the rates fixed in the ordinance complained of in the bill, between the time the temporary injunction *pendente lite* went into effect, namely, on March 8, 1909, and July 1, 1912, at which latter date counsel agree that the ordinance rates were put into effect by the complainant, should be and it is sustained to the extent herein indicated.

"And because the judge of this Court now determines that special reasons exist therefor, to-wit, the particular fitness and experience of A. G. Ronald, Esquire, the clerk of this Court, for the work to be done, the said A. G. Ronald is appointed special master of the Court for this occasion, and he is directed with all available promptness to examine the books and records of the complainant and ascertain and report the names, and as far as practicable, the addresses of all persons, firms and corporations who were subscribers to the complainant's exchange service in Louisville, Kentucky, between the 8th day of March, 1909, and the first day of July, 1913, and the sums paid by them respectively to the complainant for its said exchange service between those dates in excess of the rates fixed by the ordinance of said City approved March 6, 1909, and as far as ascertainable the dates on which said payments were made. He will also ascertain and report as to each subscriber the rate or amount charged by the complainant and that fixed by the ordinance, so as to show the difference between them.

"The special master is authorized to subpoena witnesses, to require the production of the books, papers and other records, of the complainant, and if necessary in his judgment, to employ assistants, and to take such other action as he may deem proper and necessary to enable him to comply with this order.

"For the purpose of making examination of the books and records of the complainant, the master may, if deeming it necessary, hold meetings in the city of Nashville, Tennessee, as well as in the City of Louis-

ville, Kentucky, and shall have free access to all books and records of the said complainant which pertain to the said matters.

"The special master is given liberty from time to time, if in his opinion it is advisable to apply to the Court for further instructions and for any other assistance that may be necessary to enable him to comply with this order, reasonable notice of such application to be given to each of the parties hereto.

"In all other respects the said special master will proceed in conformity with the equity rules, and will, when his work is completed, promptly and fully report the manner in which he has performed his duties under this order.

"It is also ordered that further consideration of the second of said motions, namely, that one of them by which the said defendant asks the Court to require the complainant to pay into the registry of the Court all amounts received by it from its subscribers in Louisville, Kentucky, between the said dates in excess of the rates fixed by the ordinance complained of in the bill, should be and the same is postponed until after the coming in of the report of the said special master.

"It is further ordered that another and separate motion made on September 28, 1912, by A. Engelhard & Sons Company, for leave to file a bill of intervention herein and which bill of intervention was tendered with said motion, be and the same is set for hearing on November 12, 1912.

"Enter Nov. 2, 1912.

"Walter Evans, Judge."

Petitioner says that pursuant to said order the master therein named proceeded to examine the books and records of the Telephone Company with a view to ascertaining the names of all subscribers to the Telephone Company's service, who had paid for such service during the pendency of said injunction, sums in excess of the rates fixed in the rate ordinance, and that said master is still engaged in making said investigation and will, as your petitioner is

informed and believes, make his report within the next thirty days.

Eighth. Your petitioner says that during the time said injunction was in force at least eight thousand of the patrons of the Telephone Company paid for its service sums in excess of the amounts fixed in the rate ordinance above referred to; that the amounts paid by the said patrons range from $5.00 to $100.00, the majority of said payments being less than $20.00, and that the total amount so paid will exceed $100,000.00.

Ninth. That no patron of the Telephone Company having an interest in the restitution of the sums illegally collected by the Telephone Company was a party to the litigation above referred to, and that your petitioner having been a patron of the Telephone Company during the entire time the injunction above referred to was in force and having paid to the Telephone Company more than $20.00 in excess of the amount which the Telephone Company was entitled to charge under the said rate ordinance, tendered its bill of intervention in the said cause on the 28th day of September, 1912, and asked to have the same filed and that it might be permitted to sue for and represent all of those patrons of the Telephone Company similarly situated with it and who had paid to the Telephone Company for its service sums in excess of the legal rate. Your petitioner says that by an order entered in said cause on the 12th day of November, 1912, the Honorable Walter Evans, Judge of said Court, refused to permit said bill of intervention to be filed. A copy of the order refusing to permit said bill of intervention to be filed is attached hereto and made a part hereof marked "Exhibit A."

Tenth. Your petitioner says that thereafter, to-wit, on February 15, 1913, and after the new equity rules had been promulgated by this Court, it again moved said District Court for leave to file its bill of intervention and for leave to sue on behalf of all persons similarly situated in the matter of said excessive payments; that on said date no patron of the Telephone Company who had made excessive payments or who had any monetary interest in the restitution above referred to was a party to said cause, and that your petitioner was a patron of the Telephone Company's service and was entitled to have restored to it in like manner with eight thousand of the other patrons of the Telephone Company's service, sums which had been collected by the Telephone Company from its said patrons during the time said injunction was in force in excess of the legal rate. A copy of said bill of intervention is filed herewith marked "Exhibit B."

Your petitioner says that thereafter, to-wit, on the 10th day of March, 1913, the Honorable Walter Evans, Judge of said Court, caused to be entered an order denying to your petitioner the right to intervene on behalf of the patrons of the said Telephone Company who had paid to the company sums in excess of the legal rate. A copy of said order is attached hereto and made a part hereof marked "Exhibit C."

Eleventh. Your petitioner says that thereafter, to-wit, on the 18th day of April, 1913, it tendered and filed with the Hon. Walter Evans, Judge of the said Court, a petition for an appeal from the said order denying it the right to intervene on behalf of the other patrons of the Telephone Company similarly situated with it, and accompanied same with an assignment of errors; that the

said Hon. Walter Evans, Judge of said Court, thereafter, to-wit, on the 19th day of April, 1913, by an order entered that day refused to grant said appeal. A copy of said petition for appeal is filed herewith marked "Exhibit D." Copy of said assignment of errors is filed herewith marked "Exhibit E." Copy of said order denying the said appeal is filed herewith marked "Exhibit F."

Twelfth. Your petitioner says that the restraining order and the injunction heretofore referred to were in force from March 8, 1909, to July 1, 1912, and during all of that time the Telephone Company exacted and collected from its patrons in Louisville, Kentucky, sums in excess of the rates fixed in the rate ordinance above referred to; that some of said patrons had a business telephone on a direct line, some had a business telephone on a party line, some had a residence telephone on a direct line, some had a residence telephone on a party line; that all of the excessive sums collected by the Telephone Company and herein referred to were from patrons having those four classes of service; that the rates for all of the above classes of service were fixed by the said ordinance of March 6, 1909, and that all of said patrons who paid sums to the Telephone Company in excess of the rates fixed by the said ordinance paid them under identically similar circumstances and stand in identically the same situation with respect to their right to have the Telephone Company restore to them the amounts exacted of them in excess of the ordinance rate; that your petitioner had a business telephone on a party line, and that more than three thousand of the patrons of the Telephone Company who paid to it for telephone service sums in excess of the rates fixed

in the rate ordinance had business telephones on party lines.

Thirteenth. Your petitioner says that it is informed that the master named in the order of November 12, 1912, above referred to, will within the next thirty days make his report showing the names of the Telephone Company's patrons who paid to it sums in excess of the ordinance rates, and the amounts so paid; that the effect of the refusal on the part of the said Hon. Walter Evans, Judge of said Court, to permit the said patrons to be represented in the said cause is not only to deny to them the right granted under the equity rules promulgated by this Court, but is also to deny to them the right to be heard on the correctness of the said master's report or to file exceptions thereto and will result in having their rights finally adjudicated without allowing them to appear or have their day in Court.

Fourteenth. Your petitioner says that the amounts collected by the Telephone Company as herein set out constitute a trust fund held by the said Telephone Company for its patrons; that unless your petitioner, or some other patron of the Telephone Company having an interest in said trust fund, is permitted to intervene, then the rights of the *cestui que* trust in said trust fund will be finally adjudicated without any opportunity being given them or any one for them to assert their rights or have their day in Court.

Fifteenth. Your petitioner says that if the order of March 10, 1913, entered by the Hon. Walter Evans, Judge of the said District Court for the Western District of Kentucky, was not a final order from which an appeal could be taken, then the rights of the 8,000 patrons to the

Telephone Company's service who have an interest in the fund above referred to, will, unless this Court issues its writ of mandamus as hereafter prayed, be finally adjudicated without the presence in Court of any party having an interest in said fund. And your petitioner says that it and those for whom it sues have no adequate remedy other than a writ of mandamus as aforesaid; that even an appeal is not an adequate remedy because the master's report will have been filed and confirmed before an appeal can be heard and determined.

Wherefore your petitioner prays this Honorable Court for a rule on the Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to show cause why a writ of mandamus should not be issued by the Court commanding said Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to vacate said order of March 10, 1913, in so far as same denies unto your petitioner the right to sue for all patrons of the Telephone Company similarly situated with it; and to enter an order permitting your petitioner to sue for, represent and act in behalf of all persons similarly situated with it with respect to the restitution of the sums collected by the Telephone Company from its patrons in Louisville, Ky., between March 8, 1909, and July 1, 1912, in excess of the rates fixed in the rate ordinance of March 6, 1909.

And if this cannot be done then your petitioner prays this Honorable Court for a rule on the said Hon. Walter Evans, District Judge of the United States for the Western District of Kentucky, to show cause why a writ of mandamus shall not be issued by the Court commanding the said Hon. Walter Evans, District Judge of the United

States for the Western District of Kentucky, to grant unto your petitioner the appeal prayed for on the 18th day of April, 1913, and refused by the said Hon. Walter Evans, Judge of the Court aforesaid, and to sign and enter an order in accordance with the terms of the petition filed on said date; and your said petitioner further prays that this Honorable Court will grant to your petitioner such other and further relief, or both, in the premises as may be just.

And your petitioner will ever pray.

Dated, Louisville, Ky., May 24, 1913.

A. ENGLEHARD & SONS COMPANY,
By VICTOR H. ENGLEHARD,
President.

CLAYTON B. BLAKEY,
HUSTON QUIN,
Attorneys for Petitioner.

State of Kentucky, County of Jefferson, ss.:

Victor H. Englehard being duly sworn says that he is the president of A. Englehard & Sons Co., the petitioner herein, and that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to these matters he believes it to be true.

VICTOR H. ENGLEHARD.

Subscribed and sworn to before me, this 24th day of May, 1913. My commission expires February 6, 1916.

C. B. BLAKEY,
Notary Public, Jefferson County, Ky.

Exhibit A.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Complainant,*

vs.

CITY OF LOUISVILLE, *Defendant.*

Judgment on motion of A. Englehard & Sons Company.

This day came the complainant by Messrs. W. L. Granberry and A. P. Humphrey, its counsel, and came also A. Englehard & Sons Company, Incorporated, by C. B. Helm, Esq., its counsel, and motion of A. Englehard & Sons Company made herein on September 28, 1912, for leave to file a bill of intervention in this cause coming on to be heard, was argued by counsel, and later in the day the Court, after consideration, being then sufficiently advised, delivered its option in writing, which is filed, and in accordance therewith it is ordered, adjudged and decreed that the said motion for leave to file said petition for intervention should be, and it is, overruled and denied, but this action is without prejudice to the right of said A. Englehard & Sons Company again hereafter to tender their said or any other like bill of intervention, and again to move for leave to file the same whenever it shall appear to be proper, under the views expressed in said opinion, it not being intended that the determination of the question arising on the present motion shall be final, but only as postponing the matter until the proper time.

The A. Englehard & Sons Company except to the foregoing ruling of the Court, and is given leave to tender its bill of exceptions so as thereby to make its said petition a part of the record in this cause.

Exhibit B.

UNITED STATES OF AMERICA.
DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Complainant,*

vs.

THE CITY OF LOUISVILLE, KENTUCKY, *Defendant.*

Bill of Intervention of A. Englehard & Sons Company.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky:

Your intervenor, A. Englehard & Sons Company, on behalf of itself and all other subscribers to the Cumberland Telephone & Telegraph Company's service who have paid to said company since March 6, 1909, for telephone service sums in excess of the legal rate which said complainant was authorized to charge for its services, comes and by leave of Court files this its bill of intervention in the above entitled cause and states:

First. That your intervenor, A. Englehard & Sons Company, is a corporation duly incorporated and existing

under and by virtue of the laws of the State of Kentucky, and having its principal place of business in the City of Louisville, Jefferson County, Kentucky.

Second. That your intervenor on the 22d day of June, 1909, tendered and sought to have filed a bill of intervention in the above styled cause wherein it sought to have this Court modify the restraining order granted in the cause and eliminate from its provisions this intervenor and all other Louisville subscribers to the telephone service of the complainant; that the object of your intervenor in seeking to have said restraining order so modified was in order that it and the other subscribers to the complainant's service might avoid paying to the complainant for telephone service a rate in excess of that fixed by the ordinance of March 6, 1909; that as shown by the record in this cause the said bill of intervention was not allowed to be filed.

Third. That on the 28th day of September, 1912, it tendered and sought to have filed its bill of intervention in the above styled cause, wherein it petitioned this Court for leave to act for itself and all other subscribers to the complainant's telephone service who had between March 6, 1909, and July 1, 1912, paid to the complainant for the telephone service sums in excess of the rates fixed by the ordinance of March 6, 1909; and wherein it sought to have this Court order the complainant to pay into the registry of this Court all such sums, and for an order distributing same among those entitled thereto. Your petitioner says that as shown by the record, the said bill of intervention was not allowed to be filed.

Fourth. Your intervenor says that it is and has been since March 6, 1909, a subscriber to the telephone service

of the complainant; that it has been paying for the use of said service the sum of $5.00 per month during all of the times between March 6, 1909, and July 1, 1912, which said sum is subject to a discount of fifty cents per month for prompt payment, or a net sum in favor of said complainant of $4.50 per month; that your intervenor has what is known and designated as a business party line, service unlimited, and that by and under the terms of the ordinance of March 6, 1909, the rate for said service is limited to $4.00 per month, and that said complainant was at no time subsequent to March 6, 1909, authorized to charge or collect a greater rate than $4.00 per month for said service; that had your intervenor at any time between March 6, 1909, and July 1, 1912, refused to pay the rate charged by the complainant for said telephone service said complainant would have taken from this intervenor's place of business the telephone there installed and would thereby have deprived it of the use of said telephone service.

Fifth. Your intervenor says that between March 6, 1909, and July 1, 1912, the complainant furnished telephone service to about 14,000 subscribers in the city limits of the City of Louisville; that about eight thousand (8,000) paid to the complainant sums in excess of the rates fixed in the ordinance, all of which sums were paid under compulsion, and that all of the subscribers so paying such sums are entitled to have same refunded; that many of the payments so made to the complainant in excess of the amount fixed in the rate ordinance are small, in most cases not exceeding Twenty ($20.00) Dollars, in many cases not exceeding Five ($5.00) Dollars, and in no case exceeding One Hundred ($100.00) Dollars, and that the

subscribers who have paid said sums cannot afford to institute legal proceedings to collect the amounts so paid by them to the complainant; that it is impossible for your intervenor, or for any one except the complainant, to state how many subscribers to the complainant's service have paid to it rates in excess of the legal rate, but that your intervenor believes and charges the fact to be that at least eight thousand (8,000) subscribers to the complainant's service in the City of Louisville have paid to it during the pendency of this litigation rates in excess of the legal rate. Your intervenor states that for each of said subscribers to intervene in this action would necessarily cause the filing of a multiplicity of intervening petitions and suits, would add to the expense of this suit, would complicate this record and would entail great loss of time, labor and money; and your petitioner herein says that the right of restitution herein asserted is a right common and general to all persons paying sums for telephone service in excess of the rates fixed in the ordinance of March 6, 1909, and that this petitioner belongs to that class; that if an order of restitution is not made in this case against the complainant the result will not only cause a multiplicity of suits in this Court or in some other Court, but will necessarily cause the loss of many thousands of dollars to the small users of telephone service who cannot afford to prosecute their claims against the complainant.

Sixth. Your intervenor further says that it is informed and believes and charges the fact to be that during the pendency of this litigation, to-wit, on July 9, 1909, the judge of this Court refrained from modifying the temporary restraining order granted in this cause and re-

frained from requiring the complainant to pay into Court the charges made by it for telephone services in excess of the rates fixed by the ordinance of March 6, 1909, and refrained from requiring the complainant to give a bond to restore said payments solely for the reason and because of the fact that the complainant through its counsel stated and agreed in open Court that if the Court would not make any such order then in that event the complainant would guarantee to refund and repay to each and every subscriber to its service in the City of Louisville all amounts which said subscribers might pay to said complainant in excess of the rates fixed by the ordinance of March 6, 1909, provided said ordinance on final hearing was not declared to be confiscatory and to this end would keep an accurate account showing the amount paid by each subscriber for telephone service; and your intervenor charges that said stipulation hereinbefore referred to was the consideration which induced the Court to withhold its order requiring the complainant to pay into Court or to give bond for restitution of the charges made by it for telephone service in excess of the rate fixed by the ordinance of March 6, 1909, and that said statement constituted a pledge that the complainant would promptly repay all such collections in the event the said ordinance should not be declared confiscatory. Your petitioner says that the collection of rates for telephone service in excess of the rates fixed by the ordinance of March 6, 1909, was an illegal exaction of money and that the money so exacted and received by the complainant is not the property of the complainant but is the property of those paying such excessive rates, and the amount thereof constitutes a trust fund which should be paid into the registry of this Hon-

orable Court and administered for the benefit of those entitled thereto.

Seventh. Your petitioner says that the special master heretofore appointed by this Court to ascertain the amounts collected by the complainant in excess of the legal rates and the names of those from whom such collections were exacted has not yet made his report, but will make same shortly, and it is important to your petitioner and the other subscribers to the complainant's service to know whether or not the said report when made shows the names of all those who have made excessive payments to the complainant, and whether the amounts as reported are correct, and to be permitted to point out to the Court any errors that may appear in said report of the special master to the end that the rights of all the parties in interest may be protected; and your petitioner further represents that its attorneys were attorneys for the defendant until the 15th day of December, 1912, on which date they ceased to represent the defendant; that the said attorneys are thoroughly familiar with the record in this case and with the rights of your petitioner and the other subscribers to the complainant's service and have been requested by your petitioner and more than one thousand of said subscribers, to represent this petitioner in this cause and to aid in protecting any rights the subscribers to the complainant's service may have in the collection and distribution of excessive charges made by the said complainant.

Your petitioner says that as shown by the record in this case, the defendant, the City of Louisville, as a municipal corporation has not paid to the complainant any sums in excess of the ordinance rate, and is, therefore, not entitled to have refunded to it any part of the sums

charged by the complainant in excess of the rate ordinance; that said City in representing the subscribers to the complainant's service in the matter of recovering sums paid by the subscribers to the complainant's service is acting *pro bono publico* merely and not as a real party in interest, nor as a representative of a class.

Wherefore your petitioner, A. Englehard & Sons Company, prays that this its bill of intervention be filed herein and that this petitioner be made a party to this cause and that it be permitted to act herein in behalf of itself and all other persons similarly situated with respect to or interested in the restitution of excessive charges made by the complainant; that the complainant be required to pay into the registry of this Court upon the approval of the master's report all amounts received by it on account of payments for telephone service from subscribers in the City of Louisville in excess of the rates fixed by the ordinance of March 6, 1909, together with interest thereon at the rate of six (6%) per cent per annum from the time such excessive payments were made, same to be forthwith distributed for the benefit of whom it may concern, including your petitioner and all others similarly situated and interested; that upon the coming in and approval of the report of the master a decree be entered adjudging the complainant liable to your petitioner and to others similarly situated or interested for the excessive payments so made by them to the said complainant together with interest thereon as aforesaid; and ordering said complainant to pay into Court said sums so found; that out of the funds so paid into Court, or otherwise as the Court may determine, all costs and expenses incurred in the filing and prosecution of this intervening petition be paid, in-

cluding an attorney's fee to petitioner's attorneys for their services herein; and your petitioner finally prays for all other proper and equitable relief to which it and those for whom and in whose behalf it intervenes herein may be entitled.

A. ENGLEHARD & SONS COMPANY,
By VICTOR H. ENGLEHARD,
President.

CLAYTON B. BLAKEY,
Solicitor.

United States of America, Western District of Kentucky, ss.:

On this —— day of February, 1913, before me personally appeared Victor H. Englehard, who is president of the intervenor, A. Englehard & Sons Company, a corporation, and its chief and highest officer, who made solemn oath that he had read the foregoing bill of intervention, subscribed by him, and knows the contents thereof and that the same is true to his own knowledge except as to the matters therein stated on information and belief, and to those matters he believeth to be true.

Subscribed and sworn to before me by Victor H. Englehard, this —— day of February, 1913. My notarial commission expires on the —— day of ————.

Notary Public, Jefferson County, Ky.

Exhibit C.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Complainant,*

vs.

CITY OF LOUISVILLE, *Defendant.*

Order on Motion of A. Englehard & Sons Company for Leave to File Bill of Intervention.

A. Englehard & Sons Company, a corporation having heretofore on February 15, 1913, tendered to the Court and prayed for its leave to file a bill of intervention in this action, and said motion coming on to be heard, and having been argued by counsel, and the Court having carefully considered the same and being now fully advised, delivered its opinion thereon in writing, which is filed, and pursuant thereto it is now ordered, adjudged and decreed that upon the deposit with the clerk by the said A. Engelhard & Sons Company of a sum probably sufficient to cover its costs herein, its said bill of intervention will be at once filed, and when that is done the said A. Engelhard & Sons Company shall thenceforth be a party defendant herein for the purpose of making its claim to any sum it may have paid the complainant for the use of its telephone service in the City of Louisville, Kentucky, during the period between March 8, 1909, and July 1, 1912, over and above the rates for such service prescribed by the ordinance enacted by said City and set forth in the bill of complaint herein. At the election of the said A. Engelhard & Sons Company it may treat its bill of intervention

as its claim herein subject to the complainant's right to move to require it to be made definite and certain in its averments or it may replead so as explicitly to state its claim and the nature and amount thereof. But so far as the said A. Engelhard & Sons Company by its said bill of intervention prays to be permitted to act or claim herein for or on behalf of any other person than itself its prayer is denied and overruled, but with liberty to renew the same whenever it shall be made to appear to the Court in any appropriate way that other specifically-named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, said company shall be at liberty to apply for leave to do so.

Enter March 10, 1913.

Exhibit D.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Complainant,*

vs.

THE CITY OF LOUISVILLE, KENTUCKY, AND A. ENGELHARD & SONS COMPANY, *Defendants.*

Petition for Appeal.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky:

The intervening petitioner, A. Englehard & Sons Co., feeling itself aggrieved by the order and decree made and

entered in this cause on the 10th day of March, A. D. 1913, and that there is error to the prejudice of said intervening petitioner and those similarly situated with him with respect to the restitution sought by said intervening petition, in the said order and decree by which it will be irreparably injured, does hereby appeal from said decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith; and it prays that its appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States at Washington, D. C.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

C. B. BLAKEY,
Solicitor for Defendants

Exhibit E.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, *Complainant,*

vs.

THE CITY OF LOUISVILLE, KENTUCKY, AND A. ENGLEHARD & SONS COMPANY, *Defendants.*

Assignment of Errors.

To the Honorable Walter Evans, Judge of the United States District Court for the Western District of Kentucky:

And, now, on this the 5th day of April, 1913, comes the intervening petitioner and defendant, A. Englehard & Sons Company by its solicitors, Clayton B. Blakey and Huston Quin, and says that the order and decree entered and rendered in the above entitled cause on the —— day of March, A. D. 1913, is erroneous and unjust to the said intervening petitioner and those similarly situated with it with respect to the restitution sought in said intervening petition, and assigns errors herein as follows:

1. The Court erred in refusing to permit the said intervening petitioner to sue herein and sue in behalf of all persons similarly situated with it with respect to the restitution of excessive charges made by the complainant for telephone service during the pendency of the litigation in the above styled cause.

2. The Court erred in holding that subscribers to the complainant's telephone service would not be entitled to a restitution of sums collected by the complainant in excess of the ordinance rates unless on another trial of the case the ordinance was declared to be valid.

3. The Court erred in holding that there was no occasion nor necessity for individual subscribers to intervene for themselves and others similarly situated until the question of the validity of the ordinance had been passed upon.

4. The Court erred in refusing to hold that the amounts collected by the complainant from its subscribers for tele-

phone service in excess of the ordinance rates should upon ascertainment be paid into Court for immediate distribution among those entitled thereto.

5. The Court erred in refusing to permit the numerous parties interested in said restitution to be represented in the above styled cause by the intervening petitioner who filed his said intervening petition in the interest of all patrons of the complainant who had paid to the complainant sums for telephone service in excess of the ordinance rates.

6. The Court erred in holding that the interest of all subscribers to the complainant's service who had paid to the complainant sums in excess of the ordinance rates was not a common or general interest.

7. The Court erred in refusing to permit the intervening petitioner to be admitted as a party to this litigation for the purpose only of enabling it to assert its claim to any overcharges made against it by the complainant for telephone service.

8. The Court erred in refusing to permit the intervening petitioner to sue for and represent all patrons to the complainant's service who had paid to the said complainant sums for telephone service in excess of the ordinance rates, it appearing from the record that no party to this cause had any direct monetary interest in such recovery and no party to this cause objecting to the said intervening petitioner so appearing and representing the parties in interest.

Exhibit F."

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY, *Complainant.*

vs.

THE CITY OF LOUISVILLE, KENTUCKY, *Defendant.*

Order on A. Englehard and Sons Company. Petition for Appeal.

The Court being now sufficiently advised of the questions arising upon the motions of A. Englehard and Sons Company for leave to file an assignment of errors herein and for leave to file a petition that it may be granted an appeal to the Supreme Court from the order entered herein on March 10, 1913, and described in said petition, delivered its opinion therein in writing, which is ordered to be filed, and in accordance therewith it is further adjudged and decreed that said assignment of errors and said petition for an allowance of an appeal as prayed for be, and they are, filed, but the Court, and also the judge thereof, upon the grounds stated in said opinion, declines to grant the appeal prayed for in said petition.

Entered April 19, 1913.

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Supreme Court of the United States

OCTOBER TERM, 1913

Original Proceeding No. 12

In re A. Engelhard & Sons Co. - - - *Petitioner*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF MANDAMUS AND RULE.

WILLIAM L. GRANBERY,
ALEXANDER POPE HUMPHREY,
Of Counsel.

HUNT CHIPLEY,
WILLIAM L. GRANBERY,
ALEXANDER POPE HUMPHREY,
Counsel.

November, 1913

JOHN P. MORTON & COMPANY, INC., LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1913.

IN RE A. ENGELHARD & SONS CO., - - - - *Petitioner.*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF MANDAMUS AND RULE.

We find little to add to the response herein filed.

The petition prays for a mandamus directed to the respondent, requiring him either to grant an appeal from the order entered upon the petition of intervention of the petitioner or to enlarge that order.

So far as the appeal is concerned it is hardly to be supposed that, in view of the fact that an appeal can be allowed by any of the circuit judges or by the justice of the Supreme Court assigned to this circuit, an application for the extraordinary remedy of mandamus will be entertained by this honorable court.

The brief for the petitioner seems to concede that the order was not a final one. If this is true, then, of course, the respondent was right in not granting an appeal.

We turn then to the other question in this case, namely, the action of the respondent upon the application of the petitioner to file an intervening petition not only in its own behalf but in behalf of all other persons similarly interested.

The court will observe that the petitioner, in a manner similar to the petitioner in the companion case, has endeavored to inject into this controversy matters which, while showing a most decided animus against the respondent, are not in any way relevant to the relief sought. Thus it is said in this petition and in the brief that the respondent failed in a timely way to dispose of the motion for the interlocutory injunction. How that affects the right of the petitioner to secure the mandamus for which he is asking, it is difficult to understand. The respondent has pointed out in his response that when the motion to set aside the restraining order was argued, in June, 1909, he declined at that time to pass upon the question—among other reasons because he desired to await the determination of a case then pending in the Circuit Court of Appeals involving a very similar matter. It is further pointed out by the respondent that in December, 1909, as soon as he had heard that his judgment in the case referred to had been affirmed by the Circuit Court of Appeals, in the presence of counsel for the Telephone Company and counsel for the City—Mr. Blakey—the respondent called up the motion for the temporary injunction in the instant case and offered to decide it; whereupon counsel for the City—Mr. Blakey—arose and stated that he had no desire to appeal from the order. Respondent understood and had the right to understand that it was no longer desired that the matter

should be passed on. These facts, so far as this record or even the brief shows, are not denied. It would seem that after this the insinuation against the conduct of the respondent should be no longer indulged in.

Again, in this petition and brief the charge is made that what the respondent has done in this case has been of his own motion and in no way upon the application of the Telephone Company; in other words, to use the language of the brief in the city's petition, that the respondent was not "content to let the parties practice their own case." Running all through the petitions and briefs in these cases there is an insinuation that the respondent has taken charge of the case practically as counsel for the Telephone Company, and has of his own motion made such orders and decrees as in his judgment would subserve the interests of one of the litigants as against the other. These are grave matters and it will be a source of regret to this court that such discourtesy to the respondent has been so freely indulged in.

Coming now, however, to the real question in this case, it is, to our minds, a simple one. During the pendency of this suit in the lower court there was a restraining order enforced which prevented the going into effect of the ordinance rates. These rates were lower than those charged by the Telephone Company in this period. By a final decree the enforcement of the ordinance rates was perpetually enjoined. This court reversed that decree and remanded the case to the lower court. Promptly the respondent entered an order with a view of ascertaining the difference between the rate paid by each customer of the Telephone Company and that which he would have paid if the ordinance rate had been in effect. We pass

by the fact that the person chosen for this service was the clerk of the court. If, prior to the entry of the order appointing him, there was any objection to his being appointed, the record is silent. Indeed, in the opinion of the court handed down on the subject of this order (Record, City of Louisville v. Cumberland Telephone & Telegraph Company, page 31) it appears that the City Attorney, in making a draft for the order as requested by the court on the hearing November 2d, himself inserted the name of the clerk as the person to be appointed. But this, too, is quite beside the mark and has no relevancy, so far as we can observe, to the question of mandamus.

What, then, is the order which is here complained of?

The order is on pages 24 and 25 of the petition in this case. That order allows Engelhard & Sons Co. to file the bill of intervention and to be made a party defendant for the purpose of making its claim to any sum it may have paid the complainant, the Telephone Company, for the use of its telephone service in the city of Louisville, Kentucky, during the period between March 8, 1909, and July 1, 1912, over and above the rate for such service prescribed by the ordinance enacted by said city and set forth in the bill of complaint herein. The order concludes as follows:

> "But so far as the said Engelhard & Sons Company by its bill of intervention prays to be permitted to act or claim herein for or on behalf of any other person than itself, its prayer is denied and overruled, but with liberty to renew the same whenever it shall be made to appear to the court in any appropriate way that other specifically named claim-

ants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, said company shall be at liberty to apply for leave to do so."

It is clear that the only denial of the prayer of the petitioner was that it should be allowed to represent all of the telephone subscribers in a claim for overcharge. There was no denial of its right to represent any one or more of such persons provided such persons asked the petitioner to represent them. It appears from the record that the special master made a careful examination of the returns of the Telephone Company and then sent out to each subscriber a postcard upon which was stated the amount that the records of the Telephone Company showed he had paid, and the amount which, if the ordinance rates were to govern, he should have paid, the difference being the amount which, under any possibility, he should be allowed to recover. The report of the master, in a tentative form, was left on file in the clerk's office of the court, and an invitation, as stated above, was given to every subscriber to come forward and state if there was any error therein. That any person finding an error was thus given full opportunity to point it out cannot be doubted. Only one person came forward asking to intervene, and that was the petitioner. Now, if the large number of persons assumed in the petition and brief to have desired the petitioner to represent them, really wished it to do so, nothing could have been easier than for the petitioner to apply under the express invitation given in the above order. We have then a case where every presumption is to the effect that no one of

these many subscribers except the petitioner desired to become a party to the cause or to undertake the expense of employing counsel to represent him.

In a case like this the city of Louisville represents all the patrons of the Telephone Company. This is so clearly pointed out, with an abundant citation of authority, in the case of San Francisco Gas & Electric Co. v. City and County of San Francisco, 164 F. R. 884, that we submit no other authorities need be cited. The opinion there relies upon the frequent cases in this court in which it clearly appears that the only necessary parties to rate cases are the governmental authorities whose duty it is to put the rates in force, whether this governmental authority be a city, in the case of an ordinance prescribing rates, or a railroad commission, in the case of such a body as that prescribing rates, or public officials about to exact penalties for failure to put in rates prescribed by legislative bodies. In all these cases the governmental authority stands as a representative of all private individuals interested in the controversy.

The city of Louisville, therefore, as stated above, in this case stands and has stood from the beginning as the representative of all the telephone subscribers. It is proposed now to require the respondent, by the process of mandamus, to admit the petitioner as the representative of all these persons. That such representation will involve them in expense cannot be doubted. The court, as stated above, invited the petitioner to come forward and show any and all persons who desired the petitioner to represent them in this controversy. Notwithstanding the fact that the city stood as the representative of all

these persons, notwithstanding the fact that all these persons had received full information as to what the report would show to be the claim of each, and notwithstanding the fact that the court invited the petitioner to come forward with the names of any persons who desired it to represent them, still it is said that the court should now be compelled, by mandamus, to allow the petitioner—presumably against the will of these unnamed persons—to represent them upon the record.

We submit that it requires only a clear apprehension of the facts of this case to convince the court that there is no merit whatever in this application for a mandamus. If, however, the court should consider it to be the duty of the respondent to admit the petitioner as the representative of all these persons, the respondent will, as in duty bound, enter the requisite order.

Respectfully submitted,

WILLIAM L. GRANBERY,
ALEXANDER POPE HUMPHREY,
Of Counsel for Respondent.

HUNT CHIPLEY,
WILLIAM L. GRANBERY,
ALEXANDER POPE HUMPHREY,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

ORIGINAL PROCEEDING No. 12

In re A. ENGLEHARD & SONS CO., - Petitioner

Return of Walter Evans, Judge of the District Court of the United States for the Western District of Kentucky.

Hunt Chipley

ALEXANDER POPE HUMPHREY,
WILLIAM L. GRANBERY,
Counsel.

BLACKER-RANDALL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913

ORIGINAL PROCEEDING No. 12

In re A. ENGLEHARD & SONS CO. . . . Petitioner

To the Honorable the Justices of the Supreme Court of the United States:

The return of Walter Evans, Judge of the District Court of the United States for the Western District of Kentucky, to the rule made herein on June 10, 1913, respectfully shows that:

The prayer of the petition is that the respondent, as such Judge, be required to vacate an order entered by him on March 10, 1913, and described in the petition, in so far as same denies the petitioner the right to sue for all the patrons of the Telephone Company similarly situated with it, and to enter an order permitting your petitioner to sue for, represent and act in behalf of all persons similarly situated with it with respect to the restitution of the sums collected by the Telephone Company from its patrons in Louisville, Ky., between March 8, 1909, and July 1, 1912, in excess of the rates fixed in the rate ordinance of March 6, 1909. And if this can not be done, then that a writ of mandamus be issued commanding respondent to grant the petitioner the appeal prayed for on the 18th day of April, 1913, and re-

fused by respondent, and to sign and enter an order in accordance with the petition for an appeal filed on that day.

For Cause the Respondent Respectfully Shows: First. That in the suit pending in the Court of which respondent is Judge, and lately in the Circuit Court, styled *Cumberland Telephone and Telegraph Company* vs. *City of Louisville*, and the complainant in which we shall herein call the Telephone Company, the respondent, on April 25, 1911, rendered a decree holding the ordinance complained of by the Telephone Company to be null and void. This judgment, on June 7, 1912, was reversed by this Court, and its mandate was sent down directing respondent to proceed further in the cause in a manner not inconsistent with the opinion of the Court. Upon the filing of the mandate on September 28, 1912, respondent entered an order restoring the case to the docket to be proceeded with as he conceived the mandate to direct. Afterwards it was contended by the City of Louisville (which we shall call the City) through its then City Attorney, Mr. Blakey (who then also represented and now represents the petitioner), and by the present City Attorney, Mr. Beckley, that a proper construction of this Honorable Court's opinion and mandate required the dismissal of the Telephone Company's action without prejudice, which contention, if sound, would have required that to be done on September 28, 1912, upon the presentation of the mandate by Mr. Blakey, the then City Attorney. If respondent, in taking the contrary course, disobeyed the mandate, his order of September 28, 1912, restoring the suit to the docket for further proceedings he supposes was void

and that no suit was pending in which an intervening petition could be filed, the action being already potentially dismissed without prejudice by force of the mandate requiring it. But the respondent did not believe that the opinion and mandate required a dismissal of the suit which the Telephone Company had brought against the City alone, and in which the Telephone Company had sought to enforce rights which it claimed under the Constitution of the United States. Upon this phase of the case the respondent has fully shown what he believes to be sufficient cause in his response to the petition in Original No. 20, *In re* City of Louisville, petitioner, and to avoid repetition except in one respect, he prays the Court that his response in that closely related matter may be considered and read as part of his response in this case. He submits that if the Telephone Company's case should have been dismissed on September 28, 1912, upon the presentation, at that date, of the mandate of this Court, it must be regarded as having been then done, and that the principal suit was thereafter not a pending cause, and was not such when petitioner was permitted to intervene on March 10, 1913, and that the order of the respondent in respect thereto was for that reason ineffectual for any purpose.

In the petitioner's petition much stress appears to be laid upon the fact that the respondent did not early in 1909 decide a motion made by the Telephone Company in its suit against the City for a temporary injunction. Though the exact pertinency of these statements to any claim of the petitioner made four years afterwards, when, for the first time, it became a party to that suit, is not clear to respondent, he nevertheless quite willingly

states the facts showing what he did in that regard and why he did it.

On March 8, 1909, a temporary restraining order in the usual form was entered in the case of the *Cumberland Telephone Company* vs. *The City of Louisville*. It was provided therein that it should remain in force until the 29th day of March thereafter, at which time the Telephone Company was required to make and enter its motion for a temporary injunction *pendente lite*. The order contained the following very usual provision: "This restraining order shall remain in force until said time and until said motion for a preliminary injunction shall have been heard and disposed of and until the further order of this Court."

On March 29th the Telephone Company moved the Court for a temporary injunction according to the prayer of the bill. On the same day the City filed its answer and numerous affidavits were filed in opposition to the motion for a temporary injunction. On March 31st the motion for a temporary injunction was argued and submitted. On June the 15th, 1909, the City moved to dissolve the restraining order. This motion was argued on June 22nd, and on June 29th the Court entered an order in the following terms:

> "The Court being now sufficiently advised of the motion made on the 15th inst. to dissolve and set aside the temporary restraining order entered herein on the 8th day of March, 1909, is of opinion that said motion should be, and accordingly it is, overruled. The restraining order by its terms was to continue in force until the Court should deter-

mine the questions arising upon the motion for an injunction *pendente lite*. The Court has not as yet had time and opportunity to determine those matters, and, besides, it had assumed from what had occurred in the case and at the bar that by the time the questions connected with the temporary injunction could be finally settled, the whole case could be better heard upon full presentation of all the testimony and the report of the Master, and it was thought that this would be more desirable than its settlement upon the *ex parte* affidavits. Moreover, the Court particularly desired the guidance of the Circuit Court of Appeals, as it might be afforded by its decision of the case pending there of the same complainant against the City of Owensboro."

This order is to be found on page 57 of Volume One of the printed record in that case in this Court, but only the last clause of it is of present importance.

Meantime, on April 2nd, 1909, the case had been referred to Henry Burnett, Esq., as Special Master, with general directions to take the testimony and ascertain the facts upon the issues made by the pleadings. As it turned out the proceedings before the Master, for various reasons, unavoidably occupied greatly more time than had been anticipated.

The respondent was of opinion that the ruling of the Circuit Court of Appeals in the case referred to in the order just copied would in all probability be controlling, and regarded it as certain that if his judgment in that case were reversed he must necessarily overrule the motion for a temporary injunction. That case would, it was

supposed, by very soon argued, but in fact it was not argued in the Circuit Court of Appeals until the 5th day of October, 1909, soon after the summer vacation, and on the 14th of December following (174 Fed., 739) that Court rendered its decision, which affirmed respondent's judgment in the Owensboro case. Without waiting for the coming down of the opinion in that case and before it was received, namely, within a very few days after it was rendered, and certainly in December, 1909, when Mr. D. W. Fairleigh, then one of the counsel for the Telephone Company, and Mr. Blakey, then the City Attorney, were both present in Court, the respondent called their attention to the fact that the judgment in the Owensboro case had been affirmed, and stated to them in open court that if either party desired that the motion referred to and under submission should be decided the Court was ready to decide it then, and especially if either party desired to appeal from the ruling that might be made thereon. This suggestion, as then stated, was also made because for some months the then Special Master had been taking proof upon questions where both parties had the right to cross-examine. The fact was alluded to that a temporary injunction, if granted, would rest upon *ex parte* affidavits and not upon testimony taken with opportunity for cross-examination, and the question was distinctly asked counsel whether they would prefer the then status to remain until the testimony was all taken and the report of the Special Master made, or whether they would prefer to take the case up on appeal from the decision of the motion then under submission. Mr. Blakey was the first to rise and to state that he did not desire to appeal from any ruling of the court in the premises, and left the distinct and inevitable impression upon

the respondent's mind that he preferred that the question of an injunction should be finally determined on the testimony to be reported by the Special Master. The respondent, under those circumstances, did not decide the motion, thinking that all parties preferred a postponement, and consequently nothing was done. The respondent, in the pressure of other labors, thought of the matter no further, and did not suppose that any assignment of error had been based upon it (if, indeed, it ever was) until, in March, 1912, sensational reports, especially of Mr. Blakey's argument in this Court upon that aspect of the case, appeared in the newspapers. The inference was fair that if Mr. Blakey desired on behalf of the City to appeal from an order granting a temporary injunction he would have said so when the respondent thus brought the facts to his attention, and as the record at that time would have consisted of pleadings and affidavits only the appeal could have been prepared very promptly, and of course could have been advanced if the Court thought proper. All this occurred nearly eleven months before Mr. Burnett, the Special Master, filed his report on November 17, 1910, after having fully performed his duties under the order of reference to him. Easily enough, if there had been a frankly stated desire to appeal, the City could have had the question of the right to a temporary injunction settled some time before the last named date. It was distinctly understood by respondent that another course was preferred, and the motion for the temporary injunction *pendente lite* remained as it was for that reason.

SECOND. FURTHER SHOWING CAUSE, respondent states that the said C. B. Blakey in his capacity as at-

THIRD. FURTHER SHOWING CAUSE, the respondent states that in the absence of construction and application of Equity Rules 37 and 38 in concrete cases it was not and is not altogether clear to respondent exactly how they should be applied to the case in which the order complained of was entered. The petitioner seems to have sought to blend the two rules without distinctly proceeding under either.

Rule 38, which, for convenience, we here copy, is in this language: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Respondent conceived this rule to apply to the *beginning* period of a litigation, when, under the conditions stated in the rule, if shown to exist, one person might sue for all, or, if the necessary conditions were shown to exist, one person might, in that event, make the defense for all. But he did not for a moment yield to the view or believe in it that in a litigation which had progressed for a long time between proper parties, another person, incidentally having an insignificant interest in it, had the right or should be permitted to come into it on his own mere motion, and himself take charge of one side of the litigation. Besides, respondent cannot see how Rule 38 applies or how its provisions are open to the petitioner in the present stage of the principal case, because the City is already the one person properly defending that suit for all persons interested as *defendants*, and this would seem to exhaust the right under the rule for one person to defend for a class. Nevertheless, respondent allowed petitioner to intervene to protect any

interest it may have in the event the ordinance is upheld and also to protect the interest of any one else who may authorize it to do so.

The respondent concluded that only the last clause of Rule 37 was applicable and also for convenience inserts it, as follows: "Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding." This seems to be the only clause in the new rules which in any way relates to intervention in a suit by an outside party who, upon reading it, is, in strictness, rather a *plaintiff* than a defendant, and is certainly subject to the last clause of the rule just copied. Construed in the light of the well established practice respondent supposed it to be certain that the phrase in the rule, "*may at any time be permitted* to assert his right by intervention," admitted of a certain range of discretion, and especially if Rule 38 could be construed to allow (as respondent thought it could not) an *intervenor*, under Rule 37, to sue or defend for any person except himself unless such other expressly consented. Conceiving himself to have this measure of discretion, the respondent will plainly state the facts within his knowledge and largely within the knowledge of the patrons of the Telephone Company and of the public during the time he was considering the subject, and he submits to this Honorable Court whether the equity rules it has promulgated should be so construed as to embrace the scheme to be described and whether or not the respondent abused any discretion he may have had in limiting the right of the petitioner to its own claim and to those of other persons who might be shown to have authorized the petitioner to act for them.

A. Engelhard & Sons Company is a corporation, doing business in Louisville, and was a patron of the Telephone Company. The amount it paid to the Telephone Company during the period from March 8, 1909, to July 1, 1912, in excess of the rates fixed by the ordinance attacked in the suit was precisely $21.50 and no more. The report of A. G. Ronald, Special Master, shows the exact state of the account. The petitioner during that period paid $181.50. The ordinance rate therefor would have been $160, the difference being $21.50. No question of the accuracy of this finding has been made.

The petitioner consented that Mr. Clayton B. Blakey, the late City Attorney, might, in the character of its attorney, use its name upon the petition of intervention presented to respondent with a motion for leave to file it on February 15, 1913. The petitioner then knew of the scheme presently to be described and for the carrying of which into effect its name was to be used. It accepted a promise of indemnity against any expenses to be incurred but disclosed none of these facts in its petition of intervention. It asserted a right to act for all patrons of the Telephone Company without the least claim to any actual authorization for so doing. The petition was nominally that of A. Engelhard & Sons Company but in effect was doubtless that of the persons who were interested in promoting the scheme referred to. It was and is questionable whether under these circumstances the petitioner can be said to have come into court with clean hands (222 U. S., 204.)

Mr. Blakey and the Assistant City Attorney, Mr. Houston Quin, went out of office in December, 1912. Later in that month they caused to be sent out through

the mail (necessarily at a cost, for postage, printing and clerical work, many times greater than the petitioner's entire claim) to each of the thousands of customers of the Telephone Company (a list of whom they had procured in the preparation of the suit referred to) a circular letter inclosing a post card. On the back of the post card was printed the following form of agreement to be signed by the patron and mailed, to-wit:

"*Messrs. C. B. Blakey & Haston Quin:*

"I hereby request you to represent me in the matter of my claim against the Cumberland Telephone Co., for the refund of overcharges made by that company, and agree to pay you a sum equal to 25% of any amount that may be recovered, and hereby constitute you my attorney in fact to collect any such sum.

Name .....

Address .....

The face of the post card shows what follows, viz.:

POST CARD

ROOM 1408

Inter-Southern Bldg.

CITY

This room was and is the office of Blakey & Quin, attorneys. The printed circular was prepared by Mr. Blakey, who procured it to be signed by certain friends, as indicated thereon. This circular was as follows:

Telephone Committee

Subscribers should recover the difference between the ordinance rate and the amount paid during a period of forty months from March, 1909.

THESE RATES PER MONTH ARE AS FOLLOWS:

	Ordinance	Company's
Business Direct - - - - -	$5.50	$8.00
Business Party - - - - - -	4.00	5.00
Residence Direct - - - - -	3.00	4.00
Residence Party - - - - - -	2.00	3.00

LOUISVILLE, KY., Dec. 27, 1912.

DEAR SIR: Under the ruling made by Judge Evans, the reduction in the Cumberland Telephone Company's rates will be of short duration unless on another trial of the case the Courts finally uphold the rate ordinance. In other words, Judge Evans holds that the Supreme Court, by its opinion, meant only that the rates should be enforced until the Telephone Company gave them a fair trial, and if on such trial they were found to be too low, then the old rates should be restored.

"Judge Evans has also held that the payments made by the subscribers in excess of the ordinance rates can not be recovered until the ordinance is declared to be valid on another trial.

"This means that the Telephone Company, after charging low rates for two years will enter upon another four years' litigation with the city. If the company again loses its case we shall not only continue to get low telephone rates, but shall

recover what we paid since February, 1909, in excess of the ordinance rates.

"The case in its very nature is complicated and we assume that all subscribers prefer to have Mr. Blakey and Mr. Quin, who are familiar with every detail of the case, try it again. But they are no longer connected with the city's law department. The present City Attorney goes out of office in one year, which will be before the case can be tried.

"We therefore ask you to join with us in requesting Messrs. Blakey and Quin to continue the fight, and further to authorize us to agree to pay them 25 per cent of any amount the Telephone Company is required to refund, to cover their fees and expenses.

"The services of Messrs. Blakey and Quin are dependent on the number of subscribers who want them. We urge YOU to sign and mail the enclosed card at once.

"Yours very truly,

"JOHN H. LEATHERS,
"WM. HEYBURN,
"LEE S. BERNHEIM."

It will be noticed that those who signed the foregoing letter did not do so as a committee, nor were they, in fact, such. The use of the words "Telephone Committee" at the head of the letter was to give it greater effect, and, as respondent has been informed, and believes, there was no such body.

The scheme was also given much newspaper exploitation, and was a matter very generally and publicly known.

In due course of mail, in December, 1912, or January, 1913, one of these post cards and one of the printed cir-

culars came to respondent's desk in his chambers, but from whom he does not know. It probably, in fairness, should be stated that under the ruling of the Kentucky Court of Appeals the words "a sum equal to" used in the form of contract printed on the postcard would take that instrument out of the Kentucky Champerty Statute (*Ramsey* vs. *Trent*, 10 Ben Monroe, 341), though that Court, so far as respondent can recall without examination, has not passed upon other phases of the proceeding. But the question respondent was concerned with was whether, with a knowledge of this scheme, as shown by newspaper publications and by the papers before him, and which latter he did not doubt originated with the attorneys and came from their office, he should allow this public information to influence him in exercising any discretion he had in permitting the petitioners to intervene for the benefit of all the patrons of the Telephone Company instead of those only who might in some way authorize the petitioner to act. The petition of intervention disclosed a desire on the part of A. Engelhard & Sons Company to act for the benefit of all patrons of the Telephone Company, while it was obvious from the small amount of its claim and the postcard and circular that the scheme was most largely if not altogether for the benefit of those who were striving to obtain 25 per cent of the whole amount that might ultimately be found to be owing to the patrons of the Telephone Company if the City should be victorious in the defense of its ordinance. Being clearly of opinion that the City should fight that battle and that the petitioner could add nothing to the City's strength in the contest, respondent could not believe that the City should abandon or be let

out of the case which it was its duty to defend for all its citizens at its own expense.

The petitioner had shown that the overcharges, considered from the standpoint of the ordinance rates, would amount to $100,000. The Special Master's report shows it to be $136,686.42. Twenty-five per cent of this would be about $34,171. The respondent could see, if the ordinance should be sustained, how each *individual* customer would then have a *separate legal demand* against the Telephone Company for the excess rates charged him, but could not see how any trust fund could be created by the efforts of A. Engelhard & Sons Company and its attorneys. The trust fund idea seemed to be valuable, not to the patrons of the Telephone Company, but to those interested in the 25 per cent division, as through that idea the attorneys, as its alleged creators, might claim a fee out of it as a whole, and not be limited to those who might sign the contract. If the city, by defending its legislative enactment, succeeded in maintaining its validity, the patrons need not be subjected to the 25 per cent charge unless they agreed to the proposed contract. Respondent thought the reasons given in his opinion abundantly sustained the propriety of his order, but he certainly did not, under all the circumstances, believe it to be his duty to aid the 25 per cent scheme, and consequently he did not do so. The facts stated undoubtedly, and he thinks, properly, emphasized and strengthened his conviction that his order of March 10th was all the petitioner was entitled to. It permitted the intervention of A. Engelhard & Sons Company and any others who gave to that concern authority to act for them. The complaint now made in A. Engelhard & Sons Company's name is that the order did not permit A. Engelhard & Sons Company

to represent all patrons of the Telephone Company in respect to the restitution of charges due separately to individual patrons whether those patrons desired that corporation to do so or not. Respondent did not construe the equity rules to require this or even to permit it. He may have been in error, and if so, this Honorable Court will remedy it by a construction of the equity rules in connection with the facts. Respondent did not feel bound to shut his eyes to a state of facts publicly known which seemed clearly to disclose the real situation and which he was confident ought, of itself, to justify his order limiting the intervention of A. Engelhard & Sons Company to its own individual interest in the case and to that of such other patrons as might be shown to have authorized it to act. Respondent had no doubt that as the petitioner and those signing the post card contract would have the same attorneys there would be no difficulty about giving authority to the petitioner.

Respondent submits to this Honorable Court the question whether there exist any grounds for a mandamus to compel him to so construe the equity rules as to bring this case within them or to do more than his order of March 10, 1913, provides for, but he tenders assurance of his entire readiness to do in the premises anything this court may direct or suggest.

Fourth. The petitioner prays that the writ of mandamus, if not applicable for the correction of the order of March 10, 1913, may be issued to compel respondent to grant an appeal therefrom as prayed in the petition therefor. For cause in respect to this phase of the case the respondent says it is true that he declined to grant the appeal. While always solving every doubt in favor of an appeal from his judgments, respondent thought

the order in this instance was so clearly interlocutory that he had no doubt that an appeal would be premature. His order in the premises shows on its face that he stated his reasons for declining to grant the appeal in a written opinion then filed, but again the petitioner has abstained from showing what the opinion was. It is, therefore, appended as Exhibit "B", in which the order is copied in full.

As respondent orally stated after reading the opinion, there were many other justices or judges, any one of whom had the power to grant the appeal notwithstanding respondent felt it to be his duty to decline to do so. The petition for an appeal and the assignment of errors were permitted to be filed so that any other judge might act if applied to. If the appeal lay to this court the following cases plainly show that any one of the justices of this court or the court itself might act:

Brown vs. *McConnell*, 124 U. S. 489.
Brandies vs. *Cochrane*, 105 U. S. 262.
Draper vs. *Davis*, 162 U. S. 37.
Sage vs. *Railroad Co.*, 99 U. S. 714.

If the appeal from the order lay to the Circuit Court of Appeals then Section 11 of the Circuit Court of Appeals Act authorizes any one of the Circuit Judges of the Sixth Circuit to grant it.

It suited the petitioner to apply for the mandamus rather than to a justice of this court, and it is respectfully submitted whether that is an admissible course.

October, 1913.

WALTER EVANS,
Judge United States District Court for the Western District of Kentucky.

ALEXANDER POPE HUMPHREY,
WILLIAM L. GRANBERY,
Counsel.

OPINION. EXHIBIT A.

Cumberland Telephone and Telegraph Company vs. *City of Louisville:*

The Court has considered the motion of A. Engelhard & Sons Company made February 15, 1913, for leave to file a petition of intervention in this cause. The motion is a renewal of one previously made, in reference to which the Court in an opinion delivered on November 12, 1912, carefully stated its views, the repetition of which in detail seems to be unnecessary. However, the Court's opinion then was and is now that claims such as that of the petitioner can have no basis unless and until it is ascertained in this action that the ordinance of the City of Louisville attacked by the complainant is valid. If the ordinance is invalid and confiscatory, A. Engelhard & Sons Co. will have no claim, inasmuch as the rates charged by the Telephone Company will, in that event, have been valid and collectible. The vital question involved in this litigation and which must be first determined, is as to the validity of the ordinance rates, and that question is being valiantly fought out in this suit between the Telephone Company and the City of Louisville, the latter being capable of defending and entitled to defend the interest of her citizenship under the ordinance enacted by her. The presence of individual citizens, therefore, is altogether unnecessary in the contest between the parties to this action in their effort to secure a determination of the essential question involved. That question had once been settled so far as this Court could then settle it. But for reasons stated in its opinion the Supreme Court said that it was not content to let that settlement stand, unless the ordinance rates were first put into effect, so as to have the actual results of the operation of the ordinance rates ascer-

tained. That is to say, the Court held that there ought to be a settlement of that question upon actual figures rather than upon those which, to a certain extent, might be theoretical. Such a settlement will require a trial of those rates for a reasonable time—possibly for a year or two—and in the meantime the individual claimants of what they think are excesses in the rates charged them above those fixed by the ordinance must inevitably and necessarily wait until the essential problem is worked out by the actual trial and operation of the ordinance rates, that being the way fixed by the Supreme Court for ascertaining whether the latter are confiscatory. Until that has been done every right-thinking and fair-minded person will understand that it can not be known whether any excess rate has been charged. None will have been charged if the ordinance is finally held to be void on account of its alleged unconstitutional and confiscatory character.

It may be added that on the motion of the City of Louisville, an order was entered on the second day of November, 1912, appointing a Special Master to ascertain what, if any, rates the Telephone Company had charged between March 8, 1909, and July 1, 1912, in excess of the ordinance rates. Primarily, as we all know, this was done to ascertain the amount for which a bond should be exacted from the Telephone Company to make sure of the payment by it of the aggregate of such excesses as a basis for continuing in force or for granting an injunction restraining the collection of those excesses, *pendente lite*—a course which would protect the rights of all persons in interest pending the litigation and secure to them prompt payment of the excess, should the ordinance be ultimately upheld. It was and is hoped that the report of the Special Master may also be valuable and available

for establishing the excess, if any, paid by each customer of the Telephone Company, though, of course, action upon this phase of the case must unavoidably and inevitably wait until the vital question of the validity of the ordinance shall be finally settled. Hence, our idea, suggested in the former opinion, that we should not act on the motion to allow the intervention of individual customers of the Telephone Company until that company and the City had carried the litigation to a point where we could at least see that it was probable that the customer had some interest which the City could not protect as well as the customer could, and we thought the petition for intervention should be held in abeyance until then. The former petition would have been held in abeyance but for the insistence of petitioner's counsel that there should be a prompt decision of the motion. The motion was, however, overruled without prejudice to the right to renew it, and within that ruling the present application was doubtless made.

EXHIBIT "B".

Opinion on A. Engelhard & Sons Company's Petition for an Appeal.

Cumberland Telephone and Telegraph Company, Complainant,

vs.

City of Louisville, Defendant.

On the 5th inst. A. Engelhard & Sons Company, a corporation, presented an assignment of errors and a petition for an appeal to the Supreme Court of the United States, and prayed that both of said papers be filed, and that an appeal be allowed the corporation

accordingly for a review of an order made in this cause on March 10, 1913. The matter was set for hearing on the 18th inst., and it was then argued by counsel for the said corporation and taken under advisement by the Court.

The order from which the appeal is prayed is as follows:

"A. Engelhard & Sons Company, a corporation, having heretofore on February 15, 1913, tendered to the Court and prayed for its leave to file a bill of intervention in this action, and said motion coming on to be heard, and having been argued by counsel, and the Court having carefully considered the same and being now fully advised, delivered its opinion thereon in writing, which is filed, and pursuant thereto it is now ordered, adjudged and decreed that upon the deposit with the Clerk by the said A. Engelhard & Sons Company of a sum probably sufficient to cover its costs herein, its said bill of intervention will be at once filed, and when that is done the said A. Engelhard & Sons Company shall thenceforth be a party defendant herein for the purpose of making its claim to any sum it may have paid the complainant for the use of its telephone service in the city of Louisville, Ky., during the period between March 8, 1909, and July 1, 1912, over and above the rates for such service prescribed by the ordinance enacted by said City and set forth in the bill of complainant herein. At the election of the said A. Engelhard & Sons Company it may treat its bill of intervention as its claim herein subject to the complainant's right to move to require it to be made definite and certain in its averments, or it may replead so as explicitly to state its claim and

the nature and amount thereof. But so far as the said A. Engelhard & Sons Company by its said bill of intervention prays to be permitted to act or claim herein for or on behalf of any other person than itself its prayer is denied and overruled, but with liberty to renew the same whenever it shall be made to appear to the Court in any appropriate way that other specifically-named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, said company shall be at liberty to apply for leave to do so."

We are authorized to grant appeals, and never fail to do so, unless it seems perfectly clear that it is improper. We always give the benefit of the doubt to the persons seeking the appeal. But we think the above order is so manifestly interlocutory, and so certainly not final in any sense, that we should not grant an appeal from it, and certainly not to the Supreme Court instead of the Circuit Court of Appeals. Appeals lie only from final orders, and the one we have copied is obviously final in no sense, as the slightest examination of it must demonstrate. We have set it forth above so that there can be no doubt about it.

Consequently the order will be that the assignment of errors be filed. Also that the petition for an appeal be filed, but that, for the reasons indicated, the appeal will not be granted, either by this Court or by the Judge thereof.

WALTER EVANS, Judge.

April 19, 1913.

The views expressed in the former opinion were the result of very careful consideration. Speaking generally they remain unchanged. Nevertheless, it may now be well to deal with the matter in some detail from a different standpoint.

Obviously the City was the proper party to be sued in this action. Indeed, upon perfectly well established principles, it was the only proper party to defend, in its corporate capacity, the ordinance which, in that capacity, it had enacted. The City acts for the entire community in all municipal matters, and one who sues the City is neither required nor permitted to make each and every citizen a party to the action. This rule is established upon principles of common sense. A contrary rule would be intolerably burdensome as well as absurd. Hence the City—the municipal corporation—under the law of its organization is authorized to sue or be sued alone in respect to all municipal rights or obligations. These observations apply to this case the dominant question in which is whether an ordinance enacted by the City is valid. Its validity has been attacked, and resistance to that attack rests with the City alone through counsel of her own selection, and, of course, the City, even in addition to her Law Department, may, under any duly enacted ordinance, retain any and every attorney she desires to entrust with the conduct of that defense. The Court can exercise no possible control over her choice of advisers, and certainly it would be most unbecoming, not to say somewhat indecent, for this Court for a moment to assume that her counsel, whoever they may be, will not adequately serve her interests. The question indicated is altogether the controlling question involved in this suit, but when, if ever, that question is decided in the City's favor, then there may be other resultant questions to be decided as between the complainant Telephone Company and its very numerous subscribers, or, as we shall call them, its customers. But these matters must necessarily be entirely incidental and subordinate to the principal question which must be fought out between

the complainant and the City. If the litigation of that question shall finally result in a judicial determination that the ordinance is valid, then it will inevitably and somewhat automatically follow that each customer of the Telephone Company in this city who, between March 8, 1909, and July 1, 1912, paid to the company more than the rates prescribed by the ordinance will be entitled to a refund of the excess. The amount of such excess paid by each individual customer must, in some way, be ascertained at some time, and the Court has conceived that it was well to do this at as small cost to the customer as practicable, and has acted upon the idea that it would be well to do it through the work of the Special Master now in progress, and the time has arrived when it may be proper to admit the intervention of such individual customers as may desire to come in, in order to be ready to see whether any excess rates paid by them have been accurately calculated by the Special Master. If the ordinance in contest shall finally be held valid, the two factors in the calculation as to each customer will be, first, the rate and amount actually paid by the customer, and, second, the rate and amount prescribed by the ordinance. If these factors be accurately found the result will be inevitable, because it will be the difference between them. Each calculation is not only extremely simple but is entirely individual—one of them in no way depending upon another.

The work of the Special Master so far has been to ascertain as a working basis the state of each customer's account on complainant's books. This was essential, not only for fixing the amount of the bond to be given by the Company, but also for the purposes to which this opinion relates. This working basis obtained, it has been and is the intention of the court to require that a preliminary

and tentative statement (usually called a trial report) shall be made up clearly and accurately showing how the account of each of complainant's customers stands on its books for the period indicated, together with calculations as to the difference between the company's rates and those fixed by the ordinance, and to have that trial report left open in the Special Master's office for public inspection for a length of time abundantly sufficient for each customer to see it and for each to point out errors, if any, therein so far as they pertain to his account. Ample time can easily be allowed for this, because, under the mandate of the Supreme Court, we must consume a considerable period in ascertaining whether the operations of the ordinance will yield to complainant a fair and reasonable return upon its property used by the public. The things indicated can be done before the report of the Special Master is finally settled or filed, and while complying with the spirit of Equity Rule 66, will afford an opportunity to avoid such costs as will come from the necessity of paying clerk's fees upon an intervention of record, besides a fee of $5.00 upon each exception decided as provided by Equity Rule 67. And that each customer may, for the period indicated, have an intelligent and accurate idea of how his account stands on the company's books (which he could scarcely otherwise obtain) and thus be afforded an opportunity to correct any error which he might think was material, the Court has given much attention to the question of a proper plan to give each customer information of the status of his account, so that he might by reference to his own books, papers and receipts at once see whether the amount of any excessive rates charged and collected from him was accurately shown on the Special Master's trial report. For best accom-

plishing this result several plans have been considered, and that one will probably be adopted which will require the Special Master to send through the mail to each customer a statement, covering the period from March 8, 1909, to July 1, 1912, of the condition of his account, with an invitation to him, if he sees any error therein, to present to the Special Master a statement in writing indicating the error. Any complaint of that or any other character can be heard by the Special Master at a minimum of trouble and expense.

In this very unusual case the condition of many thousands of individual accounts has to be ascertained by the Special Master and the charges made and amounts collected have to be set down in comparison with the ordinance rates as to each customer and the difference stated. This enormous number of calculations necessarily requires great and tedious labor and much time. More of both will be required to notify the customers upon the plan outlined, but it has been and is the desire and purpose of the Court to see that each claimant, when the matter becomes ripe for it, shall be given the fullest opportunity, without needless expense, to correct any mistake in the Special Master's figures, and we much incline to think that the plan indicated will best promote those ends. If in its contest with the Telephone Company, the City shall maintain the validity of the ordinance no expense incident to the work of the Special Master will be chargeable to the customers of the company, though (we may say by way of illustration) that it is conceivable, if others are permitted to take charge of the City's litigation, that those others may make claim to an allowance for their services out of whatever sums may then be coming to customers as overcharges, and especially may this be so if those others can then

plausibly claim that their work and not that of the City created a special fund for the benefit of a class. Of course, the right, if any, of a customer to have over charges refunded will, in fact, as we have seen, result automatically and at once from the city's victory alone. The right to a return of the overcharges being entirely dependent upon such victory such right can not exist without it, and until that victory is achieved the customer, of course, must wait.

Furthermore, it is quite manifest that the interest of each customer of the complainant is altogether separate from that of every other customer, the right of no one of them being in any wise dependent upon that of the other. Each claim for a refund of overcharges will, therefore, be individual, and each must be figured as a separate problem. Of this character is the interest of A. Engelhard & Sons Company, and its motion for leave to file its bill of intervention will be sustained to the end that it may in due course set up herein any claim it may be entitled to make for the refunding to it of any amount it, as one of the complainant's customers, may have paid to it for the use of its telephone system and service in the City of Louisville for the period between March 8, 1909, and July 1, 1912, over and above the rates for such service prescribed by the ordinance set forth in the bill of complaint. And as the question of the validity of that ordinance manifestly is the one of "common or general interest" in this litigation, and as the contest over that question will, we must assume, be adequately attended to by the City (which is *dominis litis* as to its defense), and as all claims for the refunding of excess rates (if such contingent claims shall ultimately mature), must necessarily be altogether individual in character, in

view of what we have said, no reason has been made to appear why A. Engelhard & Sons Company should at present be allowed to act for a "class" under Equity Rule 38, though if that corporation shall hereafter present to the Court satisfactory evidence in writing that it is authorized to act for other named customers, then an appropriate order can be made to apply to that situation, and thus can be made certain the persons liable to contribute to the costs or expenses incurred by said A. Engelhard & Sons Company in this action.

Upon the deposit of a sum sufficient to cover its probable costs, as required by the rules, the motion of said A. Engelhard & Sons Company for leave to file the bill of intervention heretofore tendered, will be sustained, said corporation will be admitted as a defendant herein for the purpose of enabling it to assert and maintain its claim to any overcharges of rates, and if it so elects, its bill of intervention, so far as it is applicable and appropriate to that end, may be taken as its claim to a refund of any overcharges collected from it for its use of complainant's telephone service within said period, subject to complainant's right to move to require it to be made more definite and certain in its averments, or, if so advised, it may replead and thereafter, in either event, it may proceed in respect to said claim in all proper ways. But so far as said bill of intervention seeks the leave of the Court for said corporation to represent any other person than itself, it is disallowed, and only said corporation may be made a defendant herein at this time, but whenever it shall be made to appear to the Court, in any appropriate way, that other specifically named claimants of such overcharges desire the said A. Engelhard & Sons Company to act for them herein, the latter shall be at liberty to apply for leave to do so. Of course, all claimants of over-

charges have the right to look after their claims, and will be given the amplest opportunity for so doing in person or by counsel and either jointly or severally, though the questions as to the individual claims must necessarily await the final determination of the principal contest between the City and the Telephone Company.

Orders accordingly will be entered.

WALTER EVANS, *Judge.*

March 10, 1913.

IN RE ENGELHARD & SONS COMPANY, PETITIONER.

PETITION FOR WRIT OF MANDAMUS AND RULE.

No. 12, Original. Argued November 10, 1913.—Decided January 5, 1914.

In a suit by a public utility corporation to enjoin enforcement of rates claimed to be confiscatory, the municipality is the proper party to be made defendant, and as such it can represent all parties interested.

The only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them.

It is not competent for each individual having dealings with a regulated public utility corporation to raise a contest in the courts over questions which can be settled in a general and conclusive manner. *Chicago, M. & St. P. Ry.* v. *Minnesota*, 134 U. S. 418.

Where a telephone company has sued the municipality to enjoin rates as confiscatory and an injunction has been granted upon the company paying into a fund the excess collected from the subscribers, the

municipality is the proper party to represent all the subscribers on a reference to determine the amount of refund to which each is entitled after the rates have been held not confiscatory and the injunction dissolved.

Under such conditions a single subscriber cannot represent all the subscribers as a class and the court is not compelled under Equity Rule 38 to allow him to intervene.

In this case, the court below having acted within its discretion in refusing a petition for leave to intervene, mandamus to compel it to grant the petition is refused.

THE facts, which involve the right and power of a municipality to represent the residents and citizens having contracts with a public utilities corporation in a suit brought by such corporation to enjoin as confiscatory, rates established by ordinance of the municipality, are stated in the opinion.

Mr. Clayton B. Blakey, with whom *Mr. Huston Quin* was on the brief, for petitioner.

Mr. Alexander P. Humphrey and *Mr. W. L. Granbery*, with whom *Mr. Hunt Chipley* was on the brief, for respondent.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This petition was argued and submitted with No. 11, Original and prays a mandamus issue commanding respondent to vacate the order made March 10, 1913, in the suit then and now pending, brought by the Cumberland Telephone & Telegraph Company against the City of Louisville, in so far as it denied to petitioner the right to sue for all subscribers of the Telephone & Telegraph Company similarly situated with petitioner, who paid the Telephone & Telegraph Company, during the pendency of the injunction against a certain rate ordinance enacted

by the city, sums in excess of the rates fixed in the ordinance, and commanding him to enter an order permitting petitioner to sue for and represent and act in behalf of such subscribers with respect to the restitution of the sums so collected.

If this cannot be done, then petitioner prays for a rule on said Judge to show cause why a mandamus shall not issue to grant petitioner an appeal prayed for from the order of March 10, 1913, and refused by him.

The petition recites the proceedings in the District Court substantially as they are recited in the petition in *In re City of Louisville*. It adds these details: That while the injunction was in force at least 8000 of the subscribers of the Telephone Company paid for its service sums in excess of the amounts fixed by the ordinance; that the amounts paid by them ranged from $5.00 to $100.00, the majority of the payments being less than $20.00. The total amount so paid will exceed $100,000. None of the subscribers were parties to the litigation, and petitioner, on September 28, 1912, presented and asked to have filed a bill of intervention in the cause and that it might be permitted to sue for and represent all of the subscribers who had so paid the Telephone Company. The petition was refused.

That on February 15, 1913, and after the new equity rules had been promulgated by this court, petitioner again moved for leave to file its bill of intervention and for leave to sue in behalf of all of such subscribers. The motion was denied.

A petition for an appeal was presented and denied on April 18, 1913.

That during the time the Telephone Company collected rates from its subscribers in excess of the new ordinance rates some of the subscribers had business telephones on a direct line, and some on a party line; some had residence telephones on a direct line and others on a party line. All

of the subscribers who paid the excess rates paid them under identically similar circumstances, and in the same situation with respect to their right to have the Telephone Company restore the excess. The petitioner had a telephone on a party line and more than 3000 of the subscribers of the company had the same kind of telephone.

That the effect of the order of the court is to deny the right of the subscribers to be represented in the cause upon the correctness of the master's report, which will be filed in the next thirty days, and their rights will be finally adjudicated without allowing them to appear or have their day in court. There are 8000 subscribers thus situated who have no adequate remedy against the action of the court, but mandamus.

A copy of the complaint in intervention is attached to the petition. It sets out the facts as in the petition, but more in detail, with additions in an attempt to show a common interest in all of the subscribers to the right of petitioner to appear for itself and for them. It prays that petitioner be made a party to the cause for itself and the other subscribers; that the Telephone Company, upon the coming in of the master's report, pay into the court the sums collected in excess of the ordinance rates, with interest at 6 per cent., to be distributed for the benefit of those concerned. The bill of intervention was permitted to be filed so far as to permit petitioner to assert its own claim, but so far as it prayed to be permitted to act or claim for any other but itself its prayer was denied, with the privilege, however, to renew the same upon making it appear to the court that it had authority from "other specifically named claimants" to act for them.

The basis of petitioner's contention is that it has a common interest with the other subscribers of the Telephone Company and may therefore intervene for itself

and for them. Equity Rule 38[1] is cited to sustain the contention. Petitioner is not seeking, however, as it says, "for itself or for any one the recovery of a specific portion of the fund." The alternative of this would seem to be the assertion of a right to intervene and become a party to all the controversies upon which the fund may depend, and this may mean either in conjunction with the city or independently of it, and, it may be, in exclusion of it. It is said that the city is acting only for the good of the public but that that is not "the criterion to determine whether the parties in interest have the representation to which they are entitled." It is further said that however earnest the city may be to obtain restitution to the subscribers of the Telephone Company, it might not appeal from an adverse ruling. Who is going to represent the subscribers, it is asked, upon the question of fees to the master and the costs, and the costs on appeal, and who raise the question of interest? This enumeration presents the purpose of the petition for intervention. In other words, the apprehension is expressed and made a basis of the petition for leave to intervene, that the city, which has so far conducted the litigation—and with success—may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company. This does not present a very strong plea against the discretion the court exercised, supposing the court had discretion to grant or refuse the petition.

It is contended, however, that the court had no discretion but to grant the petition and that Equity Rule 38 was peremptory of the right of petitioner. It recognizes the principle, it is said, "that the rights of persons should not be passed upon unless such persons are before the court or are represented by some one who is interested similarly

[1] See 226 U. S., Appendix, p. 11, for Equity Rule No. 38, at length.

with them." And cases are cited which, it is urged, also recognize and illustrate the principle.

We have given due consideration to the cited cases and the argument of counsel, and we are of opinion that the District Court did not exceed its discretion in making the order under review. The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller, in *Chicago, Mil. & St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 460, it was not competent for each individual having dealings with the regulated company "to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way." The rule has been repeated in subsequent cases.

Indeed, what issue is involved except that of the main suit—the character of the rates—that needs the intervention of petitioner? As to who are subscribers of the company, there can be no controversy, nor as to the amounts to be returned to them. Both names and amounts could be,

indeed had been, ascertained by the master, under an order made upon motion of the city. Petitioner, however, was not able to produce authority from any subscriber to appear for him, notwithstanding the order of respondent permitted petitioner to renew its motion whenever it should "be made to appear to the court in any appropriate way that other specifically named claimants" desired petitioner to act for them. And yet, against these facts, against, as counsel for respondent says, the possibility of a presumption that the other subscribers of the telephone company do not desire petitioner to represent them, it prays a mandamus to compel such representation.

We cannot yield to the prayer.

Rule discharged.